(16)

No. 99-1871-CFX Title: Department of the Interior and Bureau of Indian Affairs, Petitioners
v.
Klamath Water Users Protective Association

Docketed:
May 23, 2000 Court: United States Court of Appeals for the Ninth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Mar 9 2000 | Application (99A734) to extend the time to file a petition for a writ of certiorari from March 21, 2000 to April 20, 2000, submitted to Justice O'Connor. |
| | Mar 10 2000 | Application (99A734) granted by Justice O'Connor extending the time to file until April 20, 2000. |
| | Apr 10 2000 | Application (99A734) to extend further the time to file a petition for a writ of certiorari from April 20, 2000 to May 20, 2000, submitted to Justice O'Connor. |
| | Apr 10 2000 | Application (99A734) granted by Justice O'Connor extending the time to file until May 20, 2000. |
| | Apr 10 2000 | Application for extension of time to file petition and order granting same until May 20, 2000 (O'Connor, April 10, 2000). |
| | May 23 2000 | Petition for writ of certiorari filed. (Response due July 21, 2000) |
| | Jun 7 2000 | Order extending time to file response to petition until July 21, 2000. |
| | Jul 21 2000 | Brief amici curiae of Ute Indian Tribe, et al. filed. |
| | Jul 21 2000 | Brief amici curiae of Eastern Shoshone Tribe of Wind-River Reservation, et al. filed. |
| | Jul 21 2000 | Brief of respondent Klamath Water Users Protective Association in opposition filed. |
| | Jul 21 2000 | Brief amici curiae of National Congress of American Indians, et al. filed. |
| | Aug 2 2000 | DISTRIBUTED for Conference of September 25, 2000 |
| | Aug 14 2000 | Reply brief of petitioners Department of the Interior and Bureau of Indian Affairs filed. |
| | Sep 26 2000 | Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply.<br>SET FOR ARGUMENT January 10, 2001.<br>********** |
| | Nov 7 2000 | Record filed. |
| | Nov 9 2000 | Joint appendix filed. |
| | Nov 9 2000 | Brief of petitioners U.S. Department of the Interior and Bureau of Indian Affairs filed. |
| | Nov 13 2000 | Brief amici curiae of Campo Band of Mission Indians, et al. filed. |
| | Nov 13 2000 | Brief amici curiae of Natl.Congress of American Indians, |

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No. 99-1871-CFX

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | | Klamath Tribes, et al. filed. |
| | Nov 13 2000 | Brief amicus curiae of United South and Eastern Tribes, Inc. filed. |
| | Dec 5 2000 | CIRCULATED. |
| | Dec 13 2000 | Brief of respondent Klamath Water Users Protective Association filed. |
| | Dec 13 2000 | Brief amicus curiae of Tacoma, Washington filed. |
| | Dec 13 2000 | Brief amicus curiae of Reporters Committee for Freedom of the Press, et al. filed. |
| | Dec 29 2000 | Reply brief of petitioners Department of the Interior and Bureau of Indian Affairs filed. |
| | Jan 10 2001 | ARGUED. |

No.

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

*v.*

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether confidential communications between Indian Tribes and the Department of the Interior, in connection with the federal government's performance of its trust responsibility to protect and manage tribal water rights, are "intra-agency" documents that may be protected from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

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# In the Supreme Court of the United States

No.

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

*v.*

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of the Interior and the Bureau of Indian Affairs, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 189 F.3d 1034. The decision of the district court (App., *infra*, 31a-32a) adopting the findings and recommendation of the magistrate judge is unreported. The findings and recommendation of the magistrate judge (App., *infra*, 33a-71a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. A petition for rehearing was denied

on December 22, 1999 (App., *infra*, 72a-73a). On March 10, 2000, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including April 20, 2000. On April 10, 2000, Justice O'Connor further extended the time for filing to and including May 20, 2000. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

**STATUTORY PROVISION INVOLVED**

Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

**STATEMENT**

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. IV 1998), generally mandates disclosure upon request of records held by an agency of the federal government. Section 552(b) (1994 & Supp. IV 1998), however, identifies several categories of records that are exempt from compelled disclosure. This case involves the application of FOIA Exemption 5, 5 U.S.C. 552(b)(5), which authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Exemption 5 "codifies the traditional common law privileges afforded certain documents in the context



of civil litigation and discovery." *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 490 (1982); see *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) ("Exemption 5 simply incorporates civil discovery privileges."); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) ("It is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context."). Those privileges include the "deliberative process" privilege, a privilege unique to the government that protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* at 150 (internal quotation marks omitted). Exemption 5 also applies to records covered by "the attorney-client and attorney work-product privileges generally available to all litigants." *Id.* at 149. This case principally involves the application of Exemption 5 to documents that were created outside the government but were provided to federal agency officials at the agency's request and were considered by the government in its internal deliberations.[1]

For purposes of the FOIA, the term "agency" is defined to mean (with exceptions not relevant here) "each authority of the Government of the United States." 5 U.S.C. 551(1). The courts of appeals that have considered the question have uniformly concluded that at least under some circumstances, a document pre-

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[1] Six of the seven documents currently at issue fit that description. The seventh was prepared within the agency and was then provided to persons outside the government from whom the agency sought advice and assistance concerning its performance of official duties.

pared outside the government may qualify as an "intra-agency memorandum[]" within the meaning of Exemption 5.

The District of Columbia Circuit has developed the most extensive body of case law, beginning with its decision in *Soucie* v. *David*, 448 F.2d 1067 (1971), in which the court stated:

> The rationale of the exemption for internal communications indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it.

*Id.* at 1078 n.44; see also, *e.g.*, *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168, 170 (D.C. Cir. 1997) ("[R]ecords of communications between an agency and outside consultants qualify as 'intra-agency' for purposes of Exemption 5 if they have been 'created for the purpose of aiding the *agency*'s deliberative process.'") (quoting *Dow Jones & Co., Inc.* v. *Department of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990)); *Formaldehyde Inst.* v. *Department of Health & Human Servs.*, 889 F.2d 1118, 1122-1125 (D.C. Cir. 1989); *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-791 (D.C. Cir. 1980); *Hoover* v. *United States Dep't of the Interior*, 611 F.2d 1132, 1137-1138 (5th Cir. 1980); *Lead Indus. Ass'n* v. *OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); cf. *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1159-1162 (D.C. Cir. 1987) (applying same principle to discovery request



in administrative adjudication), cert. denied, 485 U.S. 977 (1988).

This Court has not yet had occasion to decide whether, and to what extent, Exemption 5 may cover documents received from (or furnished to) persons outside the government. In *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988), three Members of this Court endorsed the approach to Exemption 5 taken by the courts of appeals:

> [T]he most natural meaning of the phrase "intra-agency memorandum" is a memorandum that is addressed both to and from employees of a single agency—as opposed to an "inter-agency memorandum," which would be a memorandum between employees of two different agencies. The problem with this interpretation is that it excludes many situations where Exemption 5's purpose of protecting the Government's deliberative process is plainly applicable. Consequently, the Courts of Appeals have uniformly rejected it, holding the "intra-agency memorandum" exemption applicable to such matters as information furnished by Senators to the Attorney General concerning judicial nominations, see *Ryan* v. *Department of Justice*, 199 U. S. App. D. C. 199, 207-209, 617 F.2d 781, 789-791 (1980), and reports prepared by outside consultants, see *Government Land Bank* v. *GSA*, 671 F.2d 663, 665 (CA1 1982). It seems to me that these decisions are supported by a permissible and desirable reading of the statute. It is textually possible and much more in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred

> capacity other than on behalf of another agency—*e. g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.

*Id.* at 18 n.1 (Scalia, J., joined by White & O'Connor, JJ., dissenting). The Court in *Julian* did not address the question whether the relevant documents were "inter-agency or intra-agency" records within the meaning of Exemption 5, see *id.* at 11 n.9, since it concluded that the documents would be routinely discoverable in civil litigation and therefore would not be covered by the Exemption in any event, see *id.* at 11-14.

2. This Court has frequently recognized that "Indian tribes occupy a unique status under our law." *National Farmers Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). "Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection." Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998). Accordingly, the United States is subject to a trust responsibility to protect the natural resources of Indian Tribes. See, *e.g.*, *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987); *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942); 25 U.S.C. 162a(d). The relationship between the federal government and the Tribes with respect to Indian resources has been analogized to the relationship existing under a common law trust, with the United States as trustee, the Indian Tribe as beneficiary, and the property and natural resources as the trust corpus. See *Mitchell*, 463 U.S. at 225. The Bureau of Indian Affairs (BIA), an agency located within the Department of the Interior (DOI), is the federal agency having primary responsibility for administering



land and water held in trust for the Indian Tribes. 25 U.S.C. 1a; 25 C.F.R. Subch. H, Pts. 150-181.

In November 1993, the Secretary of the Interior directed all bureaus and offices within the agency to "be[] aware of the impact of their plans, projects, programs or activities on Indian trust resources," and "to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may affect * * * if their evaluation reveals any impact on Indian trust resources." C.A. E.R. 252. In April 1994, President Clinton issued a memorandum imposing similar requirements on all executive departments and agencies. *Id.* at 250-251. In May 1998, the President issued an Executive Order that directs federal agencies to "establish regular and meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices" that affect tribal governments. Exec. Order No. 13,084, 63 Fed. Reg. at 27,655.

The Secretary's November 1993 directive has been incorporated into the Departmental Manual governing the DOI. The Manual states that "[i]t is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety." C.A. E.R. 254. Accordingly, the Manual directs that "[a]s part of the planning process, each bureau and office must identify any potential effects on Indian trust resources" in order to ensure that such effects can "be explicitly addressed in the planning/decision documents." *Id.* at 255. The Manual further provides that

> [i]n the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s). * * * Information received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s).

*Ibid.*

3. This case principally involves documents submitted to petitioner BIA by the Klamath Indian Tribes. Pursuant to an 1864 treaty, the Klamath Tribes retain fishing, hunting, and gathering rights on lands that were previously part of the former Klamath Indian Reservation in Oregon. See Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 107.[2] In *United States* v. *Adair*, 723 F.2d 1394 (9th Cir.), cert. denied, 467 U.S. 1252 (1984), the court of appeals held that the hunting and fishing rights reserved to the Klamath Tribes by the 1864 treaty

[2] In 1954, the Klamath Indian Reservation in Oregon was terminated pursuant to the Klamath Termination Act, see Act of Aug. 13, 1954, ch. 732, § 1, 68 Stat. 718 (25 U.S.C. 564 *et seq.*). Under the 1954 Act, the Klamath Tribes' reservation lands were disposed of to private parties, individual Indians, and to federal agencies, but the Tribes' hunting, fishing, and gathering rights remained intact. See, *e.g.*, *United States* v. *Adair*, 723 F.2d 1394, 1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984). In 1986 the Klamath Tribes were restored as a federally recognized tribal entity. See Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (25 U.S.C. 566 *et seq.*).



carry with them an implied reservation of water rights, "with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights." *Id.* at 1415; see *id.* at 1408-1415. The court in *Adair* further explained that

> the right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive. The holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent other consumptive rights). Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams['] waters below a protected level in any area where the non-consumptive right applies.

*Id.* at 1411 (citation omitted).

4. Although federal reserved water rights for an Indian Tribe derive from and are defined by federal law, the adjudication of the existence and quantification of such reserved water rights may take place in the context of a general stream adjudication in state court, pursuant to the waiver of sovereign immunity in the McCarran Amendment, 43 U.S.C. 666. The State of Oregon has established a statutory procedure to determine the surface water rights of all claimants in the Klamath River Basin in Oregon. See *United States* v. *Oregon*, 44 F.3d 758, 764 (9th Cir. 1994), cert. denied, 516 U.S. 943 (1995). In *United States* v. *Oregon*, the court of appeals held that the waiver of federal sovereign immunity contained in the McCarran Amendment applied to the Oregon proceeding. 44 F.3d at 763-770.

The United States is thus a party to the Oregon adjudication and, in addition to asserting water rights on its own behalf, has an affirmative obligation to assert water rights claims on behalf of the Klamath Tribes.

See *United States* v. *White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986); C.A. E.R. 148. The BIA has therefore engaged in extensive consultation with the Tribes, including the exchange of legal analyses and theories regarding the scope of the claims submitted by the United States on behalf of the Tribes. *Id.* at 149-150. The Department of Justice, on behalf of the BIA, then submitted claims for the benefit of the Klamath Tribes. The adjudication remains pending.

5. The Bureau of Reclamation (BOR), an agency located within the DOI, administers the Klamath Irrigation Project (Klamath Project). The Klamath Project uses water from the Klamath River Basin to irrigate over 200,000 acres in Klamath County, Oregon, and two northern California counties, primarily for agricultural purposes. App., *infra*, 14a, 35a; C.A. E.R. 273. In 1995, DOI began efforts to develop the Klamath Project Operations Plan (KPOP or Operations Plan), a long-term operations plan for the Project. App., *infra*, 14a, 35a.

In connection with those efforts, DOI entered into a memorandum of agreement (MOA) with the Klamath, Hoopa Valley, Karuk, and Yurok Tribes (collectively Klamath Basin Tribes). See C.A. E.R. 115-120. Consistent with the President's memorandum of April 1994 and the Secretary's directive of November 1993 (see pp. 6-7, *supra*), the MOA recognized that "[t]he United States Government has a unique legal relationship with Native American tribal governments." C.A. E.R. 115. The MOA further recognized that "[w]ith respect to the development of the KPOP, the government-to-government relationship" between the United States and the Tribes requires "[a]ssessment, in consultation with the Tribes, of the impacts of the KPOP on Tribal trust resources." *Id.* at 116. The MOA observed that "[t]his involvement of the Tribes is a major means of assuring



that the development of the KPOP reflects the United States' trust obligations and Tribal rights." *Id.* at 118.

6. Respondent is a non-profit association consisting of Klamath Project irrigators. In 1996, respondent filed a series of FOIA requests with the BIA, seeking access to all communications between the BIA and the Klamath Basin Tribes regarding water resources issues. App., *infra*, 3a, 16a-19a, 37a-38a. The agency released several documents, but it withheld others as exempt under the attorney-work-product and deliberative-process privileges protected by FOIA Exemption 5. Plaintiff then brought this action against the DOI and the BIA.

By the time that the district court ruled in this case, only seven documents remained in dispute. See App., *infra*, 3a, 41a. Three of the documents involve the KPOP; three involve the Oregon adjudication; and the seventh is relevant to both proceedings. See *id.* at 41a-49a. Six of the documents were prepared by the Klamath Tribes or their representative and were submitted to the BIA (or, in one instance, to DOI's Regional Solicitor, see *id.* at 45a) at the agency's request. See *id.* at 41a-49a. The seventh document was prepared by a BIA official and was provided to attorneys for the Klamath and Yurok Tribes. *Id.* at 43a-44a.[3]

The case was referred to a magistrate judge, who recommended that the government's summary judgment motion be granted on the ground that the docu-

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[3] The Ninth Circuit has repeatedly held that the Yurok Tribe has fishing rights in the Klamath Basin. See, *e.g.*, *Parravano* v. *Babbitt*, 70 F.3d 539 (1995), cert. denied, 518 U.S. 1016 (1996). Although no court has adjudicated the Yurok Tribe's water rights, the view of the United States is that under the reasoning of *Adair* and other precedents of the Ninth Circuit and this Court, the Tribe has instream flow rights sufficient to support its fishing rights.

ments in question are protected by Exemption 5. App., *infra*, 33a-71a. The magistrate judge found

> that all the documents in question qualify as inter-agency or intra-agency documents under the "functional test". All the documents played a role in the agency's deliberations with regard to the current water rights adjudication and/or the anticipated [KPOP]. Most of the documents were provided to the agency by the Tribes at the agency's request. Disclosure of these documents would expose the agency's decision-making process and discourage candid discussion within the agency undermining the agency's ability to function.

*Id.* at 59a. The magistrate judge found that all of the documents were covered by the deliberative-process privilege, *id.* at 56a-61a, and that two of the documents (involving the Oregon adjudication) were covered by the attorney-work-product privilege as well, *id.* at 61a-65a. The district court adopted the findings and recommendation of the magistrate judge. *Id.* at 31a-32a.

7. The court of appeals reversed. App., *infra*, 1a-30a. The court acknowledged that the District of Columbia Circuit has adopted a "functional" approach to Exemption 5, under which a document generated outside the government may under some circumstances be regarded as an "intra-agency" memorandum. *Id.* at 6a-8a (see pp. 4-6, *supra*). The court declined to decide whether that approach to Exemption 5 is appropriate. App., *infra*, 8a. Rather, the court found it dispositive that "the Tribes with whom the Department has a consulting relationship have a direct interest in the subject matter of the consultations. The development of the KPOP and the Oregon water rights adjudication will affect water allocations to the Tribes as well as those to members of the Association." *Ibid.* The court



therefore concluded that because "the matters with respect to which [DOI] sought advice were matters in which the Tribes had their own interest and the communications presumptively served that interest," *id.* at 9a, the Tribes' submissions to the BIA could not properly be regarded as "inter-agency or intra-agency" documents, *id.* at 10a. The court stated that "[t]o hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the [DOI]." *Ibid.*

Judge Hawkins dissented. App., *infra*, 11a-30a. He explained:

> Where the Bureau and Department are, by law, required to represent the interests of Indian Tribes, the majority's holding stands as a barrier to that representation. The majority implies that status as a federally recognized Indian Tribe, and the U.S. government's trust responsibilities to the Tribes, create not a cooperative, but an adversarial relationship between the government and the Tribe, and thus FOIA can be used to destroy any opportunity for "open and honest" consultation between them. * * * I simply cannot agree with a notion I think so fundamentally wrong.

*Id.* at 12a-13a. Judge Hawkins also stated that "[t]he affidavits from Department and Bureau employees, accepted by the court below, confirm that these communications spring from a relationship that remains consultative rather than adversarial, a relationship in which the Bureau and Department were seeking the expertise of the Tribes, rather than opposing them." *Id.* at 25a-26a.[4]

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[4] Judge Hawkins also observed that the majority's conception of the relationship between the Tribes and the agency in this case

## REASONS FOR GRANTING THE PETITION

In managing and protecting the property of Indian Tribes, the federal government acts as a trustee and is bound by the high fiduciary standards that the trustee's role entails. Under established principles, a trustee is required, *inter alia*, to maintain the confidentiality of information acquired in the trust relationship if disclosure of the information would disserve the beneficiary's interests. The court of appeals in this case, however, construed the FOIA as effectively precluding federal officials from complying with that fundamental trust obligation. Because the court of appeals' decision threatens substantial disruption of the trust relationship between the United States and Indians, and in light of the broad range of property located within the Ninth Circuit that the United States holds in trust for Indian Tribes or individual Indians, review by this Court is warranted.

1. The documents at issue in this case were intended to assist the BIA in performing its responsibility to manage and protect tribal water rights held in trust by the United States. "It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987); accord, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983) ("[A] fiduciary relationship necessarily arises when the Government assumes * * * elaborate control over * * * property belonging to Indians."); see *id.* at 224-226. The government's "conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942).

Under basic trust principles, "[t]he trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts § 170 cmt. s (1959). The "direct interest" test announced by the court of appeals permits use of the FOIA as a means by which federal officials may be compelled to breach that obligation on a regular basis. Because Indian Tribes will always have a "direct interest" in the government's performance of its fiduciary responsibilities with respect to resources that the United States holds in trust for the Tribe, the court's holding effectively precludes the use of Exemption 5 to shield the confidentiality of communications between the Tribes and the BIA regarding trust property.

The ability of the United States to receive candid advice and information from Tribes is integral to the government's performance of its trust responsibilities.[5]

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"fails to recognize or address that at least four of the seven documents were used by the Bureau and the Department to prepare to represent the Tribes' claims in the Oregon water rights adjudication—not a proceeding which either the Bureau, or the Interior Department, has the authority to 'resolve.'" App., *infra*, 23a n.4.

[5] For over half a century, federal policy has favored a broad right of tribal self-government and self-determination. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 553 (1974) (explaining that "Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies" because "[t]he overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests."); *Oklahoma Tax Comm'n* v. *Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (relevant federal statutes "reflect Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal

Consistent with that understanding, DOI's Departmental Manual mandates consultation with Tribes whenever their trust resources may be affected by the Department's actions. C.A. E.R. 255. The Manual further provides that "[i]nformation received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position." *Ibid.*

Under the court of appeals' decision, however, Tribes and individual Indians who continue to provide the government with advice and information concerning trust resources may receive representation that falls short of traditional fiduciary standards, since federal officials will be unable to guarantee the confidentiality that a trust relationship ordinarily entails. Alternatively, Tribes and individual Indians may decline to

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self-sufficiency and economic development") (internal quotation marks omitted); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62 (1978). In the Indian Self-Determination and Education Assistance Act, for example,

> Congress declare[d] its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. 450a(b). Consultation with Tribes regarding the United States' performance of its trust responsibilities substantially furthers the federal policy favoring tribal self-government and self-determination, by ensuring that tribal perspectives are fully considered by federal officials charged with managing and protecting property held in trust for the Tribes.



furnish candid assessments and proposed strategies for protecting their resources. But in that event, federal officials will be deprived of critical expertise and the beneficiaries' perspective concerning trust resources that are vital to the well-being of the Indians; they may be forced to duplicate pertinent research at government expense; and their ability to manage and protect the trust property will be compromised. Under either scenario, the United States will be unable to satisfy the "exacting fiduciary standards," *Seminole Nation*, 316 U.S. at 297, that have historically governed its relationships with tribal governments; a wedge will be driven between the United States and the beneficiaries in whose interest the United States must act, and the historical relationship of trust and confidence between the United States and the Indians will be undermined.

The harm caused by the court of appeals' decision, it should be emphasized, is not visited upon the Tribes and tribal members alone. This Court has repeatedly recognized the substantial public and governmental interest in the United States' fulfillment of its trust responsibilities regarding Indian property. See, *e.g.*, *United States* v. *Candelaria*, 271 U.S. 432, 443-444 (1926); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926); *Heckman* v. *United States*, 224 U.S. 413, 437 (1912). The court of appeals' decision in this case significantly disserves those public and governmental interests by impairing the ability of the responsible officials of the United States government to perform that important federal function.

This Court has consistently expressed "reluctance to construe the FOIA as silently departing from prior longstanding practice." *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 154 (1980) (citing *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 22 (1974), and *NLRB* v. *Robbins*

*Tire & Rubber*, 437 U.S. 214, 237 (1978)). The court of appeals' construction of Exemption 5, however, effectively compels federal officials to breach an obligation of confidentiality that has traditionally been regarded as integral to any trust relationship. Absent the clearest evidence of congressional intent, the FOIA should not be read to require such a departure from traditional practice. As we explain below, no such evidence exists. To the contrary, the text and history of the FOIA, and judicial decisions interpreting the Act, reflect a recognition that FOIA's general rule of agency disclosure should not be applied in so rigid a fashion as to subvert the effective performance of governmental functions.

2. Although the FOIA reflects "a general philosophy of full agency disclosure," *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)), this Court "has recognized that the statutory exemptions are intended to have meaningful reach and application," *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Because "Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information," it provided "specific exemptions under which disclosure may be refused." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982). Congress thereby sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966) (H.R. Rep. No. 1497); see *John Doe Agency*, 493 U.S. at 152. Congress recognized in particular that "a full and frank exchange of opinions would be impossible" if all internal agency communications were made public, and that "advice from staff assistants and the exchange of ideas among agency personnel would



not be completely frank if they were forced to operate in a fishbowl." H.R. Rep. No. 1497, at 10 (internal quotation marks omitted); see *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984) (legislative history of Exemption 5 "recognizes a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations"); *Wolfe* v. *Department of Health & Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc).

It is thus well established that the indiscriminate release of deliberative materials prepared by federal officers and employees and retained by the agency would be incompatible with vigorous and effective government. At least under some circumstances, public disclosure of documents that are created by persons outside the federal government, and then provided to agency officials at the agency's request, may cause similar disruption of governmental processes. In recognition of that fact, the courts of appeals have repeatedly sustained the application of Exemption 5 to materials prepared by outside consultants or advisors. Recognizing that "Congress apparently did not intend 'inter-agency' and 'intra-agency' to be rigidly exclusive terms," *Ryan* v. *Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980), those courts have applied a "functional test" that focuses on the role a document plays in the agency's performance of its assigned functions, and on whether the document's public disclosure would result in harms comparable to those caused by release of agency-created records. See pp. 4-6, *supra*.

In the instant case, the court of appeals concluded that those decisions were inapposite—*i.e.*, that the materials at issue here could not be regarded as "intra-agency" documents within the meaning of Exemption 5—because "the Tribes with whom the [DOI] has a

consulting relationship have a direct interest in the subject matter of the consultations." App., *infra*, 8a. That reasoning is deeply flawed. As we have explained above, a duty to maintain the confidentiality of information acquired in administering a trust where disclosure would disserve the beneficiary's interests has traditionally been an integral feature of the trustee's responsibilities. The beneficiary's interest in the trust property, and the trustee's duty to protect that interest, form the essence of the trust relationship. To put it another way, the trustee's distinct responsibilities run precisely to those persons having an interest in the trust corpus. It is therefore perverse to treat the Klamath Tribes' "direct interest" in the allocation of water within the Klamath Basin as a ground for public disclosure of communications made by the Tribes to the government when acting in fulfillment of the United States' responsibilities as trustee for tribal property.

In determining whether particular materials constitute "intra-agency" records in this type of situation, a reviewing court should focus on whether the interests of the relevant federal agency and the creator of the documents are sufficiently congruent that the private party may reasonably be consulted by the agency on the matter in a confidential manner. In its capacity as trustee, the United States owes a duty of loyalty to Indian Tribes, resulting from the unique legal relationship—emanating from the Constitution and congressional mandates and recognized for nearly two centuries by this Court—in which the United States holds the lands and associated resources of the Tribes in trust for their benefit. Because a Tribe's communications with the government concerning trust resources are integral to its "governmentally conferred capacity," *United States Department of Justice* v. *Julian*, 486



U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting) (see p. 5, *supra*), as beneficiary under that unique relationship, the requisite congruence of interests is inherent in the trust relationship and the functional test is satisfied. Indeed, a Tribe's "direct interest" in the trust property makes it a particularly appropriate "consultant" with respect to the government's performance of its trust responsibilities.

The District of Columbia Circuit confronted a similar question in *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (1997). In *Public Citizen*, the court of appeals held that Exemption 5 applied to communications between the National Archives and former President Bush, pursuant to the Presidential Records Act of 1978, 44 U.S.C. 2201 *et seq.*, concerning the appropriate disposition of the former President's records. 111 F.3d at 170-172. The court stated that "[c]onsultations under the Presidential Records Act are precisely the type that Exemption 5 was designed to protect." *Id.* at 171. It explained that an agency may sometimes require the assistance of outside experts and that "[t]he former President clearly qualifies as an expert on the implications of disclosure of Presidential records from his administration." *Ibid.*

The plaintiff in *Public Citizen* contended that under the "functional test," those communications were subject to disclosure because "the former President has a distinct and independent interest that makes him an adversary rather than a consultant." 111 F.3d at 171. The court acknowledged that "a former President's power to assert his rights and privileges * * * constitutes an independent interest." *Ibid.* The court held, however, that neither "[t]he existence of independent presidential interests," nor the possibility of future conflict between the former President and the Archivist, was sufficient to negate the consultative

relationship. *Ibid.* It observed in that regard that "[d]octors, lawyers and other expert advisors may find themselves in litigation as either plaintiffs or defendants against those whom they advise (e.g., breach of contract and malpractice claims), but for all that they are still consultants." *Ibid.*

Similarly here, the mere possibility that an Indian Tribe might be dissatisfied with the government's performance of its duties as trustee in a particular instance in the future should not obscure the basic congruence of interests that is inherent in the trust relationship. To the contrary, a Tribe—like the former President in *Public Citizen*—is an especially valuable and appropriate consultant in this setting because it "clearly qualifies as an expert on the implications of" the government's decisions regarding the management and protection of trust property. See 111 F.3d at 171. As the dissenting judge in the instant case explained, "[t]he mandated consideration that the Bureau and Department have to give to the Klamath Basin Tribes' claims virtually requires that they consult the Tribes, much as the Archivist consulted the ex-President, to seek their peculiar expertise concerning their rights." App., *infra*, 25a.

3. The court of appeals also stated that to permit withholding of the documents at issue in this case "would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the [DOI]." App., *infra*, 10a. That reasoning, too, is flawed.

a. The error in the court of appeals' analysis is particularly clear with respect to the documents pertaining to the Oregon adjudication. In that proceeding, the federal government is not the decisionmaker; its role is limited to the presentation of claims (on its own behalf and on behalf of Tribes) for ultimate resolution by state



officials. See *United States* v. *Oregon*, 44 F.3d at 764 (describing procedures to be employed in the state adjudication). As the dissenting judge explained, the court of appeals' analysis "fails to recognize * * * that at least four of the seven documents were used by the Bureau and the Department to prepare to represent the Tribes' claims in the Oregon water rights adjudication—not a proceeding which either the Bureau, or the Interior Department, has the authority to 'resolve.'" App., *infra*, 23a n.4. Submissions intended to assist federal officials in their performance of representational functions before a state adjudicative body cannot sensibly be characterized as "ex parte communications."

Consistent with its trust obligation, the United States has historically represented the interests of the Tribes in disputes over their property and natural resources, including water rights. See, *e.g.*, *Winters* v. *United States*, 207 U.S. 564, 576 (1908) (noting that "[t]he Government is asserting the rights of the Indians"); *United States* v. *Powers*, 305 U.S. 527, 528 (1939); *Arizona* v. *California*, 373 U.S. 546, 595-601 (1963); *Colorado River Conservation Dist.* v. *United States*, 424 U.S. 800, 812-813 (1976); *Nevada* v. *United States*, 463 U.S. 110, 113, 116, 127 (1983). Effective representation in that setting requires the exchange of communications between federal and tribal officials in furtherance of the common purpose of protecting the Tribes' resources. Common law doctrine protecting exchanges of information between parties with a common interest in litigation "has been recognized in cases spanning more than a century." *United States* v. *McPartlin*, 595 F.2d 1321, 1336 (7th Cir.), cert. denied, 444 U.S. 833 (1979); see also *United States* v. *Schwimmer*, 892 F.2d 237, 243-244 (2d Cir. 1989);

*United States* v. *American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

The court of appeals' decision places the Klamath Tribes at a distinct disadvantage vis-a-vis other claimants in the Oregon adjudication. Under the court's ruling, the Tribes' communications to their representative (the United States) will be subject to compelled disclosure under the FOIA, without regard to the applicability of any traditional discovery privilege. Opposing claimants in the state proceeding, by contrast, may continue to assert all available privileges with regard to documents passing between them and their own representatives. This Court has "consistently rejected * * * a construction of the FOIA" that would permit the Act to "be used to supplement civil discovery." *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984). The court of appeals' unduly narrow construction of the term "intra-agency," however, will have precisely that effect.

b. The court of appeals' "ex parte communications" rationale is also erroneous with respect to the documents prepared in connection with the development of the KPOP. Like the documents related to the Oregon adjudication, those documents were submitted to (or, in one instance, prepared by) the agency in furtherance of the United States' performance of its trust responsibilities on behalf of the Tribes. That the federal government has additional duties with respect to the KPOP does not vitiate the government's duty *as trustee* to manage and protect tribal resources in accordance with fiduciary standards.

In *Nevada* v. *United States*, *supra*, this Court considered the preclusive effect of the judgment in a prior water rights adjudication in which the United States had claimed water rights for both the Pyramid Lake Indian Reservation and the planned Newlands Reclamation Project. See 463 U.S. at 113. The court of appeals in that case held that the prior judgment was not binding on the Tribe because the federal government had "compromised its duty of undivided loyalty to the Tribe" by representing competing interests in the earlier adjudication. *Id.* at 141. This Court disagreed, explaining that



> where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.

*Id.* at 142. The Court held that "the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the [prior] suit," notwithstanding the fact that both interests were represented by the United States in the earlier proceeding. *Id.* at 143. The Court thus recognized that the United States government's duty to consider and represent a variety of interests does not detract from its obligation as trustee to represent Indian Tribes and protect tribal property rights.

In the instant case, the documents pertaining to the KPOP were submitted to (or created by) the BIA in carrying out the United States' obligations as trustee for the tribal water rights potentially affected by the operation of the Klamath Project. The Court in *Nevada* v. *United States* observed that the government's trust obligations in its dealings with Indian Tribes "have been traditionally focused on the Bureau of Indian Affairs." 463 U.S. at 127; see also *id.* at 135-138 n.15;

*Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968) (identifying the BIA as "the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States").

The fact that DOI must also take into account the interests of other water users in exercising ultimate decisionmaking authority with respect to the KPOP does not alter the duty of loyalty to the Tribes owed by the agency insofar as it is acting in its fiduciary role. The KPOP-related documents submitted by the Tribes were furnished to the BIA rather than to the BOR. That fact reinforces the conclusion that the documents, while assuredly relevant to DOI's performance of its ultimate decisionmaking responsibilities with respect to the KPOP, were provided to the Department *in its capacity as trustee.* The court of appeals failed to recognize that the limitation upon FOIA's overall goal of open government that the confidential trust relationship requires is simply an unavoidable consequence of the DOI's dual role as trustee for Indian Tribes and as federal policymaker. See *Nevada* v. *United States*, 463 U.S. at 127-128 (noting the DOI's often-conflicting responsibilities to act as trustee for Indian resources and to manage federal water reclamation projects); *Idaho* v. *Oregon*, 444 U.S. 380, 391 (1980) (referring to the United States' "role as trustee for the Indians" and "its role as manager of the ocean fishery and the dams"). Because the documents at issue here were submitted to (or created by) the government in its capacity as trustee, the court of appeals erred in analogizing those documents to "ex parte communications."

4. No other court of appeals has addressed the application of FOIA Exemption 5 to documents provided by Tribes to a federal agency for the purpose of assisting the government in the performance of its trust responsibilities.[6] Notwithstanding the absence of a circuit conflict concerning the status under Exemption 5 of tribal submissions to federal agencies, the question presented warrants immediate review by this Court.



The Ninth Circuit contains approximately 62% (28 million out of 45.5 million acres) of the lands held by the United States in trust for Tribes and individual Indians, and 400 of the 556 federally recognized Tribes are within that Circuit. In addition, approximately 67 of the 122 cases in which the United States is currently representing Tribes in litigation are within the territory covered by the Ninth Circuit. The practical impact of the court of appeals' decision is therefore very substantial even if trust property within the Ninth Circuit is considered in isolation. The decision can also be expected to disrupt the trust relationship between the BIA and Tribes and individual Indians whose lands and resources are in other areas of the country. The court of appeals' ruling will inevitably cast doubt on the BIA's ability to protect the confidentiality of tribal submissions bearing on the government's performance of its fiduciary duties, and it

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[6] In *County of Madison* v. *United States Department of Justice*, 641 F.2d 1036, 1039-1041 (1981), the First Circuit held that several documents submitted by an Indian Tribe to the Department of Justice were not "intra-agency" records within the meaning of Exemption 5. The documents at issue in *County of Madison*, however, were submitted in connection with settlement negotiations concerning the Tribe's lawsuit against the United States. *Id.* at 1038. The First Circuit concluded that such documents could not appropriately be analogized to staff recommendations prepared within the agency, explaining that the Tribe's members "were past and potential adversaries, not coopted colleagues." *Id.* at 1040. The documents at issue in the instant case, by contrast, were submitted not in a setting marked by conflict between the Tribes and the United States, but "as part of a cooperative, consultative relationship mandated by Departmental policy and federal law." App., *infra*, 27a-28a (Hawkins, J., dissenting).

may thereby deter Tribes and tribal members from candidly expressing their views regarding the appropriate management of resources that the United States holds in trust for them.

Thus, while the court of appeals' decision is binding precedent only within the Ninth Circuit, the decision is likely to have a practical impact approaching that of a nationwide rule. The federal government cannot fulfill its fiduciary duties with respect to Indian trust resources without receiving candid, unfiltered information and assessments from the Tribes and individual Indians who hold the beneficial interest in those resources. In particular, in the course of litigation and negotiations concerning trust resources, the BIA and the Justice Department frequently ask Tribes to provide highly sensitive and privileged information regarding the Tribes' positions on relevant issues, as well as technical information supporting those positions. The public disclosure of tribal submissions will cause great damage to the United States' litigating and negotiating position in ongoing trust resources cases. Under the court of appeals' decision, Tribes will face a Hobson's choice: they may disclose important litigation or policy information to the trustee and face a substantial risk of public disclosure, or they may withhold from their own representative information that is necessary to the fully effective performance of the government's trust responsibilities. So profound and deleterious a change in the relationship between the United States and Indian Tribes should not be permitted to take effect without plenary review by this Court.



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2000

**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**NINTH CIRCUIT**

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**No. 97-36208**

**KLAMATH WATER USERS PROTECTIVE ASSOCIATION, PLAINTIFF-APPELLANT**

*v.*

**UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, DEFENDANTS-APPELLEES**

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[Argued and Submitted: March 3, 1999
Decided: Aug. 31, 1999]

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Before: KLEINFELD and HAWKINS, Circuit Judges, and SCHWARZER,* Senior District Judge.

Opinion By Judge SCHWARZER; Dissent By Judge MICHAEL DALY HAWKINS.

SCHWARZER, Senior District Judge:

The question before us is whether documents submitted by Indian Tribes at the request of the Department of the Interior in the course of consultation over

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* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

ongoing administrative and adjudicative proceedings involving water rights and allocations affecting the Tribes' interests are exempt under the Freedom of Information Act as "inter-agency or intra-agency memorandums or letters. . . ." 5 U.S.C. § 552(b)(5) (1994).

**FACTUAL BACKGROUND**

Klamath Water Users Protective Association (the "Association") brought this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, against the Department of the Interior (the "Department") and its constituent agency, the Bureau of Indian Affairs ("BIA"), *see* 25 U.S.C. § 1. The Association is a non-profit association of water users in the Klamath River Basin who receive water from the Klamath Project (the "Project"), a federal reclamation project administered by the Bureau of Reclamation ("Reclamation"), an agency within the Department. *See* 43 U.S.C. § 1457 (1994). Members of the Association, most of which are public agencies, such as irrigation districts holding contracts with Reclamation, receive water from the Project, as do the Klamath Basin Tribes. Those Tribes include the Klamath Tribes, with fisheries located near Upper Klamath Lake, and the Yurok, Hoopa Valley, and Karuk Tribes, with fisheries on the Klamath River. The former Tribes have demanded that the Department maintain high lake levels to protect their fisheries, while the latter Tribes have demanded increased releases to the Klamath River to benefit their downstream fisheries. The Tribes' demands, if satisfied, would lead to reduced water allocations to members of the Association and have been protested by Association members who fear water shortages and economic injury in dry years.



In 1995, Reclamation announced its intention to prepare a plan for long-term operation of the Project, the Klamath Project Operation Plan ("KPOP"). The purpose was to enable the Project to operate in conformity with the Department's various legal obligations in wet as well as dry years. The Department hired a consulting firm and held a series of meetings with interested parties. The meetings disclosed substantial disagreements among irrigation interests and the Tribes, leading the irrigation interests to fear that their water allocations would be cut. Although a draft KPOP was to be prepared for public comment in 1996, none has so far been released.

In connection with the development of the KPOP, the Department entered into an agreement with the Klamath Basin Tribes to provide consultation and cooperation to assist it in fulfilling its trust obligations. In a separate matter, the Department also filed claims on behalf of the Klamath Tribes in a water rights adjudication process established by the State of Oregon. This adjudication will quantify water rights, including those of the Klamath Tribes, in the Klamath River Basin.

The Association made several FOIA requests of the BIA for documents provided to or received from the Klamath Basin Tribes pertaining to water resources issues in the Klamath River Basin in order to discern what information was being exchanged during the preparation of the draft KPOP outside the public process. The Department released some documents, but withheld others. After the filing of this action, more were from time to time released and the Association withdrew its request for others. In the end only seven documents remained in dispute. They are listed in the

*Vaughn* index submitted by the Department and are described as memoranda provided by the tribes to the Department for use in the development of the KPOP, a memorandum from the Department concerning the government's trust obligations in developing the KPOP, and memoranda from the tribes to the Department addressing claims in the water rights adjudication.

The district court granted the Department's motion for summary judgment. Insofar as relevant to our disposition, the district court held that the documents "qualif[ied] as inter-agency or intra-agency documents under the 'functional test,'" citing *Formaldehyde Inst. v. Department of Health and Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989). It found that the documents "played a role in the agency's deliberations with regard to the current water rights adjudication and/or the anticipated Plan of Operations. Most of the documents were provided to the agency by the Tribes at the agency's request." The district court distinguished *Madison County v. Department of Justice*, 641 F.2d 1036 (1st Cir. 1981), on the ground that "the Tribes are not in current litigation with the government, but instead acted in the role of consultants" and that "[t]he government used all these documents in fulfilling their trust obligation, and as part of their decision making process." The Association appeals from the judgment. We have jurisdiction of this appeal under 28 U.S.C. § 1291 and reverse.



## I. STANDARD OF REVIEW

Ordinarily, review of summary judgment is de novo. In FOIA cases, however, because of their unique nature, we have adopted a two-step standard of review. We first determine whether the district court had an adequate factual basis upon which to base its decision. If so, we review the district court's conclusion of an exemption's applicability de novo. *See Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). Some of our cases have applied the clearly erroneous standard to review of a district court's final determination of whether a particular document is exempt under the FOIA. *See, e.g., Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803, 807 (9th Cir. 1995); *Frazee v. United States Forest Serv.*, 97 F.3d 367, 370 (9th Cir. 1996); *Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d-1082, 1085 (9th Cir. 1997). As we explained in *Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir. 1996), application of that standard is appropriate in the common FOIA case where the district court's findings of fact effectively determine the legal conclusion. We recognized, however, that where the adequacy of the factual basis is not disputed, the district court's legal conclusion whether the FOIA exempts a document from disclosure is reviewed de novo. *See id.* This appeal raises no factual issues. The question presented, whether the fiduciary and consultant relationship between the Department and the Tribes qualifies the disputed documents under the FOIA's threshold inter/intra agency test, is one of law. Accordingly, our review is de novo.

## II. APPLICATION OF THE FOIA

The FOIA "does not apply to matters that are—

. . .

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. . . ."

§ 522(b)(5). We must apply this exemption consistently with our holdings that the FOIA "'mandates a policy of broad disclosure of government documents.'" *Maricopa*, 108 F.3d at 1085 (quoting *Church of Scientology v. Department of the Army*, 611 F.2d 738, 741 (9th Cir. 1980)). When a request is made, an agency may withhold a document only if it falls within one of the nine statutory exemptions in § 522(b) and these exemptions "'must be narrowly construed' in light of the FOIA's 'dominant objective' of 'disclosure, not secrecy.'" *Id.* (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 48 L.Ed.2d 11 (1976)). "FOIA imposes on agencies the burden of proving that withheld materials are exempt from disclosure." *Id.*

The Department contends that the documents at issue, involving communications between the Tribes and the Department concerning the development of the KPOP and the Oregon water rights adjudication, meet the "functional test" of Exemption 5 for inter-agency/intra-agency communications. It rests its contention on the fact that to fulfill its fiduciary responsibility to protect and manage the natural resources of the Indian Tribes, it entered into a Memorandum of Agreement



with the Tribes acknowledging their consultative role in these two matters.

The Department places principal reliance on *Formaldehyde Inst. v. Department of Health and Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989). That case involved the application of Exemption 5 to a peer review letter received by the Centers for Disease Control ("CDC"), an agency within the Department of Health and Human Services, from a professional journal. The journal had reviewed a report submitted by an agency employee, determined not to publish the report, and then forwarded the peer review letter to the agency. The Formaldehyde Institute requested copies of all records of agency contacts with the journal relating to publication or rejection of the report. The agency rejected the request, relying principally on Exemption 5. The court of appeals reversed judgment for the Institute. Its opinion is largely devoted to determining that the peer review letter was predecisional and part of the deliberative process. But it also held that the peer review letter qualified under the inter-agency/intra-agency test. Quoting from its prior decision in *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1161-62 (D.C. Cir. 1987), which, in turn, relied on *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), it held that "'[w]hether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations.'" *See Formaldehyde*, 889 F.2d at 1118. In *Ryan*, the court had said that "[w]hen an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an

'intra-agency' memorandum for purposes of determining the applicability of Exemption 5." *Ryan*, 617 F.2d at 790. More recently, the court held that communications mandated by statute between the National Archives and former Presidents relating to access to their presidential records are within Exemption 5. *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168, 170-71 (D.C. Cir. 1997).

This court has not yet had occasion to address the reach of the inter-agency/intra-agency test under Exemption 5 and to determine whether the expansive interpretation adopted by the District of Columbia Circuit is consistent with the policy of broad disclosure on which the FOIA is anchored. We need not reach the issue here because this case differs in a material respect from those on which the Department relies. Here, the Tribes with whom the Department has a consulting relationship have a direct interest in the subject matter of the consultations. The development of the KPOP and the Oregon water rights adjudication will affect water allocations to the Tribes as well as those to members of the Association. While the Tribes and the Association may not be engaged in conventional adversary litigation, they assert conflicting claims in a contentious proceeding involving the Department. The documents at issue are relevant to those claims. Thus, this case differs from *Public Citizen, Inc. v. Department of Justice*, on which the Department relies, in that it presents not simply "the potential for an adversary relationship" but a clear and present conflict with respect to the subject matter of the documents, which is for the Department to resolve. *See* 111 F.3d at 171 ("At some point, of course, features of the other relationships (above all, a possible future adversary one) might come to eclipse the consultative relationship. . . .").



We have held that documents submitted to an agency by persons outside the government as part of an administrative proceeding are not internal agency documents exempt from disclosure. *See Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 984-85 (9th Cir. 1985) (affidavits describing union practices, officials and members submitted as part of an NLRB unfair labor practice investigation not within Exemption 5). The Department distinguishes the instant case on the ground that it had *requested* the advice of the Tribes. But that distinction makes no difference because, as *County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981), holds in a similar context, consultation with the tribes is not similar to "'the advice from staff assistants and exchange of ideas among agency personnel' that forms the object of exemption five," which exemption is limited to "inter-agency or intra-agency memorandums or letters." In *County of Madison*, the court held that communications between an Indian tribe and the Department of Justice in an unsuccessful effort to settle litigation between them did not qualify as inter-agency/intra-agency documents. It distinguished cases such as *Ryan* from the case before it in which, "by contrast, the Oneidas approached the government with their own interest in mind. While they came to parley, they were past and potential adversaries, not coopted colleagues." *Id.* While it is true that the Department requested the advice of the Tribes, the matters with respect to which it sought advice were matters in which the Tribes had their own interest and the communications presumptively served that interest, even if they incidentally

benefited the Department. Thus, we conclude that even were we to take an expansive view of the inter-agency/intra-agency test, these documents do not qualify for exemption.

To hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the Department. Rejection of such an extension does not conflict with the Department's fiduciary obligations to the Tribes. *See United States v. Cherokee Nation*, 480 U.S. 700, 707, 107 S. Ct. 1487, 94 L.Ed.2d 704 (1987). The Department exercises its regulatory powers in the context of the governing statutes; while it must act in the interests of the tribes, it may not afford them greater rights than they would have under the regulatory scheme. *See Skokomish Indian Tribe v. Federal Energy Regulatory Comm'n*, 121 F.3d 1303, 1308 (9th Cir. 1997). Indeed, the 1994 Presidential Memorandum directing the heads of all executive departments and agencies to consult with tribal governments prior to taking actions that affect them specifically, provides that "[a]ll such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals." 3 C.F.R. 1007 (1995). And a corresponding directive issued by the Secretary of the Interior in 1993 contains the identical mandate. *See* United States Dept. of the Interior, Protection of Indian Trust Resource Procedures app. Order No. 3175 (1993).

Because the documents fail to meet the threshold inter-agency/intra-agency test, we need not reach the other issues raised by the Association. The judgment is REVERSED.



REVERSED.

MICHAEL DALY HAWKINS, Circuit Judge, dissenting:

The majority, in an effort which marginally advances the cause of open government, winds up punishing entities the government has a fiduciary duty to protect. For the reasons that follow, I would affirm the judgment of the district court that the documents at issue should remain protected from the prying eyes of outsiders to the trust relationship between Native American Tribes and the Department of Interior.

We are asked here to review the district court's findings that these particular documents, in their entirety, are exempted from disclosure under the Freedom of Information Act ("FOIA") by FOIA's exemption five. Although, in its own words, the Bureau of Indian Affairs ("Bureau") and other Interior Department Agencies have provided it with "numerous documents" pursuant to its FOIA request, the Klamath Water Users Protective Association ("Association"), a non-profit corporation whose membership consists mainly of irrigation districts, continues to seek the release of these seven documents. Six of the seven documents in question were exchanged between the Bureau and the Klamath Basin Indian Tribes[1] ("Klamath Basin Tribes"

[1] The Klamath Basin Tribes include the Klamath Tribes, the Yurok Tribe, the Hoopa Valley Tribe, and the Karuk Tribe. Their interests are not always in accord, as the Tribes located near Upper Klamath Lake would prefer high levels of water in the Lake, and those located on the Klamath River would prefer high levels in the River to protect their respective fisheries, but they are generally adverse to the interests of irrigation districts—some of whom are members of the Association—who would prefer the waters be devoted to irrigation.

or "Tribes") in relation to consultation on the natural resource rights of the Klamath Basin Tribes in the Klamath River Basin in northern California and southern Oregon. The remaining document is a communication between the Department's Office of the Solicitor and a Tribe, in relation to an Oregon state proceeding in which the Department is mandated to press natural resources claims on behalf of affected Tribes.

The dispositive factor in this appeal, according to the majority, is that the Klamath Basin Tribes have a "direct interest" in the subject of their natural resource rights, and thus communications between the Tribes and the Interior Department can never fall within any reading of exemption five. In making the Tribes' "direct interest" the dispositive factor, however, I believe that the majority misreads and misapplies FOIA case law.

In deciding that these seven documents fail to meet the threshold "inter-agency/intra-agency" test for exemption from disclosure under exemption five, the majority never considers how the documents were employed in decision making. Fundamentally, the majority fails to recognize that the appropriate inquiry is an inquiry into the role a document plays in agency decision making, not into the identity of its producer. If this test were applied, I believe that the district court's conclusion that these documents are protected would be shown to be entirely correct.

Where the Bureau and Department are, by law, required to represent the interests of Indian Tribes, the majority's holding stands as a barrier to that representation. The majority implies that status as a federally recognized Indian Tribe, and the U.S. government's



trust responsibilities to the Tribes, create not a cooperative, but an adversarial relationship between the government and the Tribe, and thus FOIA can be used to destroy any opportunity for "open and honest" consultation between them. I have great respect for the majority and its author, but I simply cannot agree with a notion I think so fundamentally wrong.

## FACTS

The Klamath Basin Tribes have natural resources rights tied to the waters of the Klamath River and Lake. *See, e.g., United States v. Adair*, 723 F.2d 1394 (9th Cir. 1984) (Klamath Tribes). In the past, the Klamath Basin Tribes have asserted these water rights to protect two species of fish in the Upper Klamath Lake, and to benefit tribal fisheries in the California stretches of the Klamath River.

The United States government and its agencies have a clear trust responsibility to protect Tribal natural resources. *See United States v. Cherokee Nation*, 480 U.S. 700, 707, 107 S. Ct. 1487, 94 L.Ed.2d 704 (1987). Pursuant to Presidential and Departmental directives, all agencies within the Interior Department are required to "consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources." Department of the Interior, Departmental Manual: Part 512 American Indian and Alaska Native Programs, *Departmental Responsibilities for Indian Trust Resources* § 2.2 (1995). In spite of such consultation, the Tribes have not always agreed with the Bureau of Reclamation, an agency of the Interior Department, in its decisions allocating Klamath waters and at one point threatened to sue under the Endangered Species Act to protect fish.

The Bureau of Reclamation administers the Klamath Irrigation Project ("Klamath Project"), which uses the waters of the Klamath to irrigate over 200,000 acres in Klamath County, Oregon and two northern California counties, mainly for agricultural purposes. The Association's interest in the Klamath's waters springs from its membership which is composed in the main of irrigation districts who have entered into contracts with the Bureau of Reclamation to deliver water from the Klamath Project.[2] While the Bureau of Reclamation has obligations under the Reclamation Act and contract to these irrigators, it owes them not the slightest fiduciary duty, or obligation to assert their claims. *See Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L.Ed.2d 509 (1983) (finding obligations under Reclamation Act to project irrigators, but obligations to Indian Tribes grounded in trust responsibility); Filings of Claims for Water Rights in General Stream Adjudications, 97 Interior Dec. 21 (1989) (concluding that while United States is obligated to make filings in stream adjudications on behalf of project water rights to which it holds legal title, it is not required to make filings or present evidence on behalf of individual water users).

1. The Klamath Project Operation Plan

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[2] The Association is not itself a contractor with the Klamath Project for water. Most of its members, however, are irrigation districts and other public agencies who contract with the Klamath Project for water allocations. The members then resell the water to private individuals and firms to irrigate commercial farming in Klamath County, Oregon and Modoc and Siskiyou Counties in California.



The triggering event for the Association's FOIA request was the 1995 announcement that the Department would be developing a long-term plan for operation of the Klamath Project, known as the "KPOP." Multiple agencies within the Department, including the Bureau of Reclamation, the Bureau of Indian Affairs, the Biological Resources Division, the National Marine Fisheries Service, and the Office of the Solicitor have been jointly involved in the process. Public meetings were held to allow public participation in the planning process, and were attended by Interior Department personnel, Tribal representatives, environmental groups, members of the Association, and state agencies.

Besides the public meeting process, the Department has also separately consulted with the Klamath Tribes on the operation plan as part of its obligation to protect the Tribes' trust resources whenever a potential impact on resources might occur. The Association has no legitimate role in this consultation. Nor was the fact of it hidden from these parties: it was made visibly apparent on an information sheet distributed to publicize the planning process. The Department and Tribes entered into a "Memorandum of Agreement for the Government-to-Government Relationship in the Development of the Klamath Project Operations Plan" ("Memorandum of Agreement") which formalized the consultation commitment, and allowed participation by the tribal governments in "planning and managing the trust resource base."

The Department has not yet completed the KPOP. A draft plan was produced in 1996, but never released.

2. The Oregon Water Rights Adjudication

The Bureau also represents some of the Klamath Tribes in Oregon state proceedings to adjudicate all claims to surface water in the Klamath River Basin in Oregon. These proceedings were initiated by the Oregon Water Resources Department pursuant to Oregon law. As well as asserting its own claims, the United States has an obligation to assert the rights of the Tribes. *See United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986). While these proceedings are not covered by the Memorandum of Agreement, the tribes have been extensively consulted in the process of determining the scope of the Tribes' water rights claims, and legal theories that could be advanced on their behalf. Other federal agencies have also filed water rights claims, as have private parties.

3. The FOIA Request

In 1996, the Association submitted FOIA requests to the Bureau seeking communications exchanged between the Bureau and the Tribes during the time period the draft KPOP was being prepared and reviewed. Unhappy with the information released by the Bureau, the Association filed this action seeking further disclosure pursuant to FOIA. In the course of the litigation, the Bureau released more documents, and the Association dropped its requests for others, leaving only these seven documents at issue.

Based on its findings regarding the role the documents played in agency deliberations, as well as on the consultative relationship that trust responsibilities and the Memorandum of Agreement established with the Tribes, the court below concluded that these seven documents fall within the exemption from disclosure provided by exemption five.



Document 3, FOIA Appeal 96-168, is a fax from the Klamath Tribes to the Bureau that contains a position paper on the water rights of the tribes. An affidavit from a Bureau employee stated that the Department had requested the position paper for use in departmental deliberations about the adjudication, and trust responsibilities in developing the KPOP. The court below found that disclosure would "discourage candid discussions within the Department" and "undermine the Department's ability to address water rights issues concerning the tribes."

Document 6, FOIA Appeal 96-168, is the only document from the Bureau to the Klamath Basin Tribes. It is a draft memo prepared by a Bureau employee that was circulated to two other Bureau employees and two Tribal attorneys proposing draft language to explain the Bureau's responsibilities for trust assets in the KPOP process. The court below found that the document was used pursuant to consultation with the tribes, relied upon in agency deliberations, and that disclosure would discourage inter-departmental discussion and harm the development of the operations plan.

Document 10, FOIA Appeal 96-168, is a fax from a Klamath tribal attorney to a Bureau employee expressing views on trust resources, especially fish. An affidavit by the Bureau employee receiving the fax established that he had requested the document and used it in his work preparing for the development of the KPOP. The court below again found that the document had been obtained pursuant to consultation with the tribes, relied upon by agency personnel in deliberations, and that disclosure would discourage inter-depart-

mental discussion and harm the development of the operations plan.

Document 16, FOIA Appeal 96-201, is a letter from a Klamath tribal attorney expressing views on the tribe's water rights claim in the adjudication. An affidavit from a Department employee established that the Office of the Solicitor asked for the information and used it to prepare for the water rights adjudication. The court below again found that the document had been obtained pursuant to consultation with the tribes, been relied upon by Departmental personnel in deliberations, and that disclosure would discourage inter-departmental discussion.

Document 20, FOIA Appeal 96-201, is also a letter from the Klamath Tribes to the Bureau concerning water rights, used to prepare for the water rights adjudication. The court below again found that the document had been obtained pursuant to consultation with the tribes, relied upon by the Bureau in its deliberations, and that disclosure would discourage inter-departmental discussion and harm the development of the operations plan.

Document 25, FOIA Appeal 96-201, is a letter from a Klamath tribal attorney to the Bureau on water rights that also includes a tribal resolution. Affidavits by Bureau employees again establish that this document was requested by the Bureau to assist in preparing for the water rights adjudication. The court below made the same findings in relation to this document as to the others, and also found that disclosure would "expose sensitive litigation positions" of the Department in the adjudication.



Document 27, FOIA Appeal 96-201, is a memo from a Klamath Tribes biologist to a Bureau employee discussing biological factors that may affect trust resources such as fish. Affidavits again establish that the Bureau requested and used this document to develop the KPOP. The court below made the same findings in relation to this document as to the others, and also found that disclosure would "expose technical opinions deemed critical to analyzing the extent of the Department's trust responsibility."

ANALYSIS

The Association argues that withholding these seven documents "unfairly and unduly disadvantage[s]" the Association and its members in their ability to participate in the KPOP process. The Department argues that the district court was correct in finding that the documents fall within FOIA exemption five as inter-agency or intra-agency communications, because the Tribes are in effect "consultants" to the Bureau on the issue of Tribal natural resource rights, and that releasing the documents would chill the agency's ability to make policy decisions.

The crucial question is the interpretation and applicability of exemption five to these documents, in these circumstances.[3] Exemption five exempts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). While, like all FOIA ex-

[3] As the majority explains, while our standard of review of summary judgments under FOIA is unsettled, this threshold determination is subject to de novo review as a question of law.

emptions, we narrowly construe exemption five, *see Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982 (9th Cir. 1985), we also recognize that it "incorporates the attorney-client privilege, the attorney work-product privilege, and the executive 'deliberative process' privilege that protects candid internal discussion of legal or policy matters." *Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1082, 1083 n. 1 (9th Cir. 1997).

In considering the applicability of the "deliberative process" privilege contained within exemption five—the privilege mainly at stake in this case—this court has usually found itself engaged in a two step process: (1) determining whether a document is "predecisional," and, if so; (2) determining whether it is "deliberative." *See, e.g., Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir. 1997); *Assembly v. United States Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992); *National Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988); *Federal Trade Comm'n v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). In this instance, however, the majority's decision rests on a more basic challenge to the applicability of the exemption—a challenge to whether the documents in question are "inter-agency or intra-agency."

At first glance, the majority's decision that the documents—which no one disputes were exchanged between the Klamath Tribes and the Bureau—are not "inter-agency or intra-agency" documents seems entirely logical. The Klamath Tribes are not agencies of the federal government, and would probably strongly resist characterization as such.



Exemption five has not been so narrowly construed, however, by this court or by others. The purpose behind exemption five is the promotion of quality governmental decision making by allowing free and independent debate during the course of decision making, without exposure of intermediate opinions and recommendations to the "fishbowl" of public scrutiny. *See Environmental Protection Agency v. Mink*, 410 U.S. 73, 87, 93 S. Ct. 827, 35 L.Ed.2d 119 (1973). Since an agency will often rely on "opinions and recommendations of temporary consultants, as well as its own employees," *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), in its deliberative process, communications from these consultants, although not literally inter-agency or intra-agency can be "an integral part of [the agency's] deliberative process." *Id.* at 789-90. Thus, this circuit and others have recognized that documents created by outside consultants that otherwise qualify as deliberative, predecisional agency documents may also shelter within exemption five. *See Van Bourg*, 751 F.2d at 985 (stating that documents prepared by outsiders with formal relationships to agencies may fall within exemption five); *see also Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997); *Formaldehyde Inst. v. Department of Health and Human Serv.*, 889 F.2d 1118 (D.C. Cir. 1989); *Brockway v. Department of Air Force*, 518 F.2d 1184 (8th Cir. 1975); *Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972).

In determining whether a document, or communication from an outside consultant is part of the "deliberative process" that exemption five is designed to protect, "the pertinent element is the role, if any, that the document plays in the process of agency deliberations."

*CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1161 (D.C. Cir. 1987); *see also Formaldehyde Inst.*, 889 F.2d at 1123. The primary consideration is not the identity of the creator of the document, but "what harm, if any, the [document's] release would do to [the agency's] deliberative process." *Id.* This "functional test" covers circumstances "where an agency has 'a special need for the opinions and recommendations of temporary consultants,'" exempting documents with such information from disclosure under FOIA. *See State of Texas v. ICC*, 889 F.2d 59, 61 (5th Cir. 1990) (quoting *Hoover v. United States Dep't of the Interior*, 611 F.2d 1132 (5th Cir. 1980)).

The majority, however, holds that the seven documents here in issue can never fall within any reading of exemption five of FOIA, because the Klamath Basin Tribes have a "direct interest" in the water and natural resource rights to which the documents pertain. In my view, the majority errs in resting their decision on this "direct interest" and abandoning examination of the function of these documents within the Bureau's deliberative processes.

The majority believes the Tribes' "direct interest" in natural resource and water rights causes a conflict of interest that makes these documents function as tools of advocacy rather than consultancy. The majority is unclear, however, why this "direct interest" automatically disqualifies the documents for use in agency deliberations—whether the crux of the problem is conflict between the Tribes and the Association, or conflict between the Tribes and the Department. While the majority states at one point that the Tribes and the Association "assert conflicting claims in a contentious proceeding," they also state that these are "contested proceedings between the Tribes and the Department." [4]



Regardless of where the majority means to fix this "conflict," the function of these documents was to aid in departmental policy making, and the Tribes never exited their role of consultancy to become advocates. These documents are not advocacy, but the written record of an agency's consultation of a knowledgeable source, whose rights the agency is obligated to protect, in the process of making decisions as to how best to protect those rights.

If the majority believes that the Tribes' direct interest in natural resource and water rights is problematic because the Tribes and Association "assert conflicting claims in a contentious proceeding," the cases that the majority relies upon are inapposite. The existing case law, while relying on the role of the document in agency deliberations as the determinative factor, looks not at conflict between competing claimants before an agency, but at the existence of conflict between outside entities and an agency in trying to determine that role.

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[4] If the majority means to characterize this case as the assertion by the Tribes and the Association of "conflicting claims in a contentious proceeding involving the Department" creating a "clear and present conflict with respect to the subject matter of the documents, which is for the Department to resolve," as a threshold matter, such a characterization fails to recognize or address that at least four of the seven documents were used by the Bureau and the Department to prepare to represent the Tribes' claims in the Oregon water rights adjudication—not a proceeding which either the Bureau, or the Interior Department, has the authority to "resolve."

The "potential for an adversary relationship" raised in *Public Citizen*, 111 F.3d at 171, was not a potentially adversarial relationship between Public Citizen and the former President, but a potentially adversarial relationship between the former Presidents and the Records Agency that the court found remained consultative. *See id.* Nor did the *County of Madison* decision rest upon the adversarial relationship between the County and the Oneida, but upon the adversarial relationship—litigation—between the Department of Justice and the Oneida. *See County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981).

Moreover, this is not a case like *Van Bourg* where the agency is formally adjudicating a claim between two parties, and reviewing documents submitted by those private adverse parties to represent their positions in litigation, or a formal agency investigation. *See Van Bourg*, 751 F.2d at 985. Documents submitted in such circumstances would indeed have been submitted in response to "a mere request for information" by the agency to allow it to make a determination and could be viewed as advocacy, rather than being "a consultation or solicitation of expert advice . . . sought for the purpose of formulation of [agency] policy." *State of Texas*, 889 F.2d at 61. These documents were, instead, submitted at the request of the Bureau in order to allow it to formulate a position on the Klamath Basin Tribes' claims in the KPOP and the Oregon adjudication.

The majority argues that the Tribes' direct interest in their subject matter makes unimportant that the Bureau requested these documents from the Tribes. With the analysis properly focused on the function of



the documents, however, rather than on the identity of the consultant, the request shows that the Bureau and the Tribes were in a consultative, not adversarial relationship. Sharing proposed strategies, as several of the memos do, is not the action of parties in conflict.

If the majority means to argue instead that these are "contested proceedings between the Tribes and the Department," while this position would be in line with existing analysis of exemption five, the majority's analysis remains flawed. The Tribes and Bureau are not engaged in an adversarial relationship.

Rather than being distinguishable, *Public Citizen* is highly persuasive in establishing that exemption five does apply. *Public Citizen* directly rejects the majority's position that "a distinct and independent interest . . . makes [an outside entity] an adversary [to the agency] rather than a consultant." *Public Citizen*, 111 F.3d at 171. Much as the Klamath Basin Tribes have natural resource rights which the Bureau and Department have a duty to reconcile with other parties' claims to water, the ex-President has "rights and privileges" in records that the Archivist has to reconcile with duties to the public to make records available. *See id.* The mandated consideration that the Bureau and Department have to give to the Klamath Basin Tribes' claims virtually requires that they consult the Tribes, much as the Archivist consulted the ex-President, to seek their peculiar expertise concerning their rights, and how they wish to assert them in the KPOP and Oregon adjudication.

The affidavits from Department and Bureau employees, accepted by the court below, confirm that these communications spring from a relationship that

remains consultative rather than adversarial, a relationship in which the Bureau and Department were seeking the expertise of the Tribes, rather than opposing them. Like the court in *Public Citizen*, which relied on a similar declaration by an Archives employee explaining that the communications with the ex-President were used to streamline the reconciliation of interests and ensure rapid resolution, I believe that the "[t]he existence of independent . . . interests provides no basis for doubting this explanation." *See id.* I would find that in these circumstances "the potential for an adversary relationship is not enough to negate one of consultation." *Id.* The communications between the Tribes and the Bureau are, as the affidavits explain, communications aimed at allowing Bureau employees to understand the Tribes' natural resource rights and formulate policy accordingly.

*County of Madison*, a fundamentally different case, does not stand as a barrier to the application of exemption five even under "an expansive view of the inter-agency/intra-agency test." There, the Oneida Tribe and the United States were engaged in adversarial litigation, and the documents the United States sought to withhold were documents related to litigation settlement negotiations. *See County of Madison*, 641 F.2d at 1036, 1041-43. In such a situation of direct adversity between an agency and an outside party, documents are outside of exemption five, especially where there is not a shred of deliberative process and participation. *Cf. Van Bourg*, 751 F.2d at 985; *State of Texas*, 889 F.2d at 61. The Bureau and the Klamath Tribes, in contrast, are not "past and potential adversaries" at this point—in many ways they have a relationship akin to that of attorney and client.



The majority ignores that the factor crucial to *County of Madison*'s holding was not that the Oneida had self-interest in mind in dealing with the Department of Justice, but that the documents in question were documents related to litigation in which the two were adversaries, rather than documents that the Department had requested to formulate policy, or assist in decision making. While the interests of the parties illuminate the function of the documents in *County of Madison*, *County of Madison* was decided on that function, not on the "selfishness" of the Oneida's motives.

As the First Circuit noted, "the line between supplicants and consultants may not always be clear." *County of Madison*, 641 F.2d at 1042. In this case, however, the Klamath Basin Tribes and Bureau relationship is consultative rather than self-seeking supplication. The relationship, as well as the documents here in question, are entirely different from those in *County of Madison*. These documents were not submitted in relation to litigation, but as part of a cooperative, consultative relationship mandated by Departmental policy and federal law.

Regardless of where the "conflict" is situated, or how we interpret prior case law, the crux of the majority's unease is that at some point the Department will have to balance the rights of the Tribes and those of the Association's members in allotting water in the KPOP. Thus, the majority perceives allowing these communications to be kept from disclosure under exemption five as, in some sense, allowing "ex parte" contact. In deciding this case on grounds prompted by that concern, however, the majority fails to recognize the impli-

cations of the relationship between the Department and the Tribes and the implications of its decision for that relationship.

This does not mean, as the majority argues, allowing the trust relationship would subvert FOIA and its goals. To the contrary, just as the fiduciary relationship between the Tribes and the government is not enough alone to justify blanket application of exemption five, *see Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (trust relationship, while creating fiduciary duties, does not extend to give tribes greater rights than others under general regulations and statutes); *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997), neither should the fiduciary relationship be a barrier to the application of the exemption—the end result of the majority's decision—if the exemption's requirements are otherwise fulfilled. The main thrust of the memos quoted by the majority is to improve communications between the tribes and the government as a part of strengthening their unique relationship. The spirit behind that policy is not carried out when we not only fail to recognize that relationship, but use it to frustrate the use of this otherwise applicable FOIA exemption. I argue not for giving extra favoritism to the Tribes under an equally applicable law, but for the recognition of the consequences of a true distinction between their position and the positions of others vis-a-vis the Department in this matter.

The Department and Bureau are mandated to bring claims for, and protect the interests of the Tribes in a way that they are not required to act for the Association's members, or other parties interested in the outcome of the KPOP. The Bureau is not only the agency principally entrusted with relations with Indian Tribes in general, but in this situation it is mandated to present claims on behalf of the Tribes in both the adjudication and the KPOP proceedings. The Tribes' relationship to the Bureau, and Department, is akin to an attorney-client or fiduciary relationship. Far from being in conflict with the Tribes, the Bureau in many ways functions as the Tribes' advocate.



Because the Tribes and Association are not similarly situated with regard to the Department, what is occurring is not "ex parte contact." Acknowledging this difference in relationships in our analysis of this case would not mean granting the Tribes extra benefits under FOIA. FOIA does not require the release of these documents, as it might communications between the Association's members and the Department, because the Tribes have a formal consultative relationship and these documents are being used for predecisional, deliberative purposes. *See Van Bourg*, 751 F.2d at 985.

The majority's focus on "direct interest" rather than looking at the use, or function, of the documents is destructive in this context, where the Tribes and the Bureau are closely linked. This decision undermines the ability of the Bureau to fully understand and represent the Klamath Tribes in these two proceedings, without really adding much to the cause of freedom of information. There is no strong reason to chip away at that relationship in these circumstances.

It is important to remember that the Bureau, with whom all but one of these communications were exchanged, is not the final arbiter of water rights in either the KPOP or the Oregon adjudication. The Bureau is

only one agency of many involved in the formulation of the KPOP and in that process its role concentrated on safeguarding the interests of the Tribes within the broader scheme of the KPOP. No position that the Bureau alone takes is likely to be taken as a given in the KPOP, and accepted without dispute by the other agencies in the Department.

In the end, the Bureau's and the Department's final policy position will become public—both in the KPOP proceedings and the adjudication. The Association and all others interested will find out that decision at an appropriate time, when there will be a chance to challenge and discuss. The majority's decision, allowing the Association to leap-frog that process, gains little in the public exposure of information and loses much in terms of the ability of the Bureau to carry out its duty to protect the rights of the Tribes. Because of this, and because I believe that the proper inquiry in this case should have been an inquiry into the role the documents played in agency decision making, I dissent.



**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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Civil No. 96-3077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
PLAINTIFF

v.

UNITED STATES DEPARTMENT OF THE INTERIOR;
UNITED STATES BUREAU OF INDIAN AFFAIRS,
DEFENDANTS

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[Filed: Oct. 16, 1997]

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**ORDER**

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Magistrate Judge John P. Cooney filed Findings and Recommendation on June 19, 1997, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's report. *See* 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert. denied*, 455 U.S. 920 (1982).

Plaintiff has timely filed objections. I have, therefore, given *de novo* review of Magistrate Judge Cooney's rulings.

I find no error. Accordingly, I ADOPT Magistrate Judge Cooney's Findings and Recommendation filed June 19, 1997, in its entirety. Defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

DATED this 16th day of October, 1997.

/s/ MICHAEL R. HOGAN
UNITED STATES DISTRICT JUDGE



**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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Civil No. 96-3077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF THE INTERIOR;
UNITED STATES BUREAU OF INDIAN AFFAIRS,
DEFENDANTS

---

[Filed: June 19, 1997]

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**FINDINGS AND RECOMMENDATION**

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COONEY, Magistrate Judge:

Plaintiff, Klamath Water Users Protective Association (KWUPA), brings this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* Plaintiff seeks injunctive relief prohibiting defendants from withholding the requested documents, an order directing defendants to waive all fees for copies of requested documents, and reasonable attorney fees and costs. Defendants move for summary judg-

ment (#22). Defendants filed the documents in dispute with the court for in camera review.

## I. FACTS

In making the following statement of facts, I view the facts in the light most favorable to the nonmoving party.[1]

KWUPA is a nonprofit corporation. (Solem declaration at 1). Most of its members are contractors of the Bureau of Reclamation, who receive water for irrigation through the Klamath Project facilities. (Id. at 1-2). Plaintiff does not conduct any commercial activities, and it does not use or distribute water from the Klamath Project. (Id. at 5). Most of its members are public agencies; primarily irrigation districts, but some are not contractors within the Klamath Project. (Id. at 2 and 6).

KWUPA provides information and representation for its members on matters in which they have a common interest, and to persons in the Klamath Basin in

[1] Plaintiff objects to defendants' evidence and related statements in defendants' reply memorandum. Plaintiff objects to page 5, first full paragraph; the court finds that this objection is well taken, and is reflected in the statement of facts. Plaintiff objects to page 14, the first full paragraph. The court finds that this statement is irrelevant, and denies this objection as moot. Plaintiff objects to page 17, the second full paragraph, arguing that the Scott-Brier declaration is insufficient to establish that this document was prepared by a tribal attorney. This objection is well taken; however, the defendants' Vaughn Index also states that this document was prepared by a tribal attorney, and plaintiff failed to object to this statement. Plaintiff objects to page 21, the first full sentence. This objection is well taken. Plaintiff objects to page 24, the second full paragraph. This objection is well taken.



general. (Id. at 6). It holds annual meetings, at which it presents information regarding activities and current developments regarding water resource issues in the Klamath River Basin. (Id.). It maintains a library of materials related to water resources, agriculture, and other resource issues in or affecting the Klamath Basin. (Id.). It makes information available to the public by participation in public or civic functions, such as booths at county fairs. (Id.).

Members distribute water to nearly 230,000 acres of land for irrigation in southern Klamath County, Oregon and northern Modoc and Siskiyou Counties in California. (Id. at 2). Most of the land is irrigated and farmed by private individuals or firms. (Id.). The major source of water for irrigation in the Klamath Project area is Upper Klamath Lake. (Id. at 2). Water is stored in the lake by operation of a dam, and is also diverted from the Lake through a large canal operated by Klamath Irrigation District. (Id.). Some water released from the dam is diverted for project irrigation, while other water flows into the Klamath River. (Id.). In the past few years, the Bureau of Reclamation and Department of Interior have stated that the water in the Klamath project must be managed, allocated, or reallocated to protect interests of various Indian tribes. (Id.).

In February of 1995, the Bureau of Reclamation announced that it planned to prepare a plan for long-term operation of the Klamath Project. (Id.). They wanted to develop a plan to operate the Klamath Project according to the various legal obligations of the Department of Interior. (Id.). In February of 1995, the Bureau of Reclamation stated that the Klamath Project

Operation Plan (KPOP) would be completed by March of 1996. (Id.).

The Department of the Interior held a series of meetings to discuss KPOP development. (Id. at 3). At the meetings, the Klamath Tribes advocated decisions for the management of water that would reallocate water used in the Klamath Project to instream uses. (Id.). Some tribes advocated high flows in the mainstream of the Klamath River, while other tribes advocated high lake elevations in the Upper Klamath Lake. (Id.).

The Department of the Interior hired a consultant, CH2M Hill, to assist in KPOP development. (Id.). CH2M Hill prepared technical papers which the public commented on. (Id.). The Bureau of Reclamation also engaged the U.S. Geological Survey to review technical information and arguments submitted by various parties, including the Tribes. (Id.).

In February of 1996, Mr. Ryan, an employee of the Bureau of Reclamation, informed Mr. Solem, the manager of the Klamath Irrigation District, that he had completed a draft plan for internal review by Department of Interior personnel. (Id. at 4). Mr. Ryan informed Mr. Solem that irrigators, tribes, or other persons outside the federal government would not have an opportunity to review the plan before a draft was publicly released. (Id.). A draft KPOP was never released to the public. (Id.). Bureau of Reclamation employees stated that they hoped to prepare a long term plan by sometime in 1999, although no specific schedule or completion date has been identified. (Id. at 5).



Steve Palmer of the Regional Solicitor's Office advised plaintiff's attorney that the Department of the Interior will file claims to water rights in the Klamath River system, in the Klamath River adjudication, on behalf of the Klamath Tribe. (Simmons Declaration at paragraph 4-5). Mr. Palmer has also advised Mr. Simmons that the Department of the Interior will file claims in the adjudication to assert and protect the irrigation water rights in the Klamath Project. (Id.). Mr. Palmer expressed the belief that any information submitted by irrigation interests related to the adjudication would be made available to the tribes or other parties upon request. (Id.). The Bureau of Reclamation has received and filled Freedom of Information Act (FOIA) requests from the tribes for correspondence, information, or materials provided to the Bureau by irrigation interests or the plaintiff. (Id.).

By letters dated February 27, March 18, March 26, and July 3, 1996, Paul S. Simmons, on behalf of KWUPA, addressed FOIA requests to several components of the Bureau of Indian Affairs (BIA), as well as the Office of the Assistant Secretary - Indian Affairs. (Defendants' Exhibit 9 at 1, 5-27). Mr. Simmons requested:

> "any writing or communication provided to or received from the Klamath Basin Tribes, or any evidence or record of any communication, written or verbal, involving the Klamath Basin Tribes . . . This includes, but is not limited to, any letter, memorandum, facsimile transmission, meeting notes or notes of telephone conversations or any other conversation, meeting attendance lists, telephone logs, or any document of any kind,

> regardless of authorship, provided to or received from the Klamath Basin Tribes, or any other document that is evidence of a communication with the Klamath Basin Tribes."

(Id. at 5, 7, 10, 13, 15, 18, 20, 22, 24, and 26). The term "Klamath Basin Tribes" was defined as "each of the Klamath Tribes, the Hoopa Tribe, the Karuk Tribes, the Yurok Tribe, and their members, officers, agents, attorneys, consultants, employees, and any other person communicating on behalf of the listed Indian tribes." (Id. at 5, 7, 9, 13, 15, 18, 20, 22, 24, and 26). Mr. Simmons also requested a fee waiver based on the organization's tax-exempt status. (Id. at 6, 8, 11, 14, 16, 19, 21, 23, 25, and 27).

In a letter dated June 25, 1996, the BIA responded to Mr. Simmons's requests of February 27, March 18, and March 26. (Id. at 29-35). The BIA released two documents in their entirety and one document in redacted form. (Id.). The June 25 letter stated that the BIA was withholding 17 responsive documents, as well as the redacted portions of Cathy Wilson's appointment book, based on deliberative process privilege and/or the attorney work-product privilege under FOIA exemption 5. (Id. at 29-31). The BIA denied Mr. Simmons's request for a fee waiver stating that: "We have determined that the information requested is primarily in the KWUA's commercial interest, based on the resource issues currently facing the organization in the Klamath Basin, and thus does not meet the statutory fee waiver test in section 2.21(a)(1)(ii). The KWUA's tax-exempt status is not determinative." (Id. at 34).

In a letter dated July 18, 1996, Mr. Simmons appealed this decision. (Defendants' Exhibit 9 at 2, 40-49). In



the appeal, Mr. Simmons stated that there was no basis for the BIA's finding that the request was for commercial purposes. (Id. at 48). The letter stated that: the Association was a nonprofit corporation with no commercial interests; the Association would not profit from the information; its members included public agencies; it provided information and resources directly and indirectly to several thousand people interested in the Klamath River; the information would be maintained in the Association's library; it would be available to any member of the public; and any member of the public who wished to review it would be able to learn about and understand the activities of the Department of the Interior. (Id. at 48-49).

On January 20, 1997, the Department issued a determination on the fee waiver issue presented in Mr. Simmons's administrative appeal of July 18, 1996. (Id. at 3). The Department denied the request for a fee waiver. (Id. at 67). The denial stated that it was the Department's opinion that the disclosure was not likely to contribute to the public's understanding of the operations or activities of the BIA. (Id. at 68). The Department found that the Association's focus pertained to the interest of a small segment of interested persons, as opposed to the general public, and that to qualify for a fee waiver the release of the requested materials had to contribute to the understanding of the public at large. (Id.). The Department found that the Association was seeking the information for its own use to evaluate the proposals of the BIA and the Klamath Basin Tribes concerning the Klamath Project Operations Plan. (Id.). The Department also found that the fact that the Association would maintain the materials in a library did not demonstrate that the Association was planning

to disseminate the material to the general public, and the Department was not aware of any interest in the material by the general public. (Id.). The Department also attached an opinion from the Office of the Solicitor further explaining the legal basis for the denial. (Id.).

In response to the FOIA request dated July 3, 1996, the BIA released eight documents in their entireties, and one document in redacted form. (Id. at 2, 37-38). Twenty items, as well as redacted portions of Cathy Wilson's appointment book, were withheld, based on the deliberative process privilege and/or the attorney work-product privilege. (Id.). One document was withheld based on the attorney-client privilege and the deliberative process privilege of FOIA exemption 5. (Id.). By letter dated August 3, 1996, the BIA denied Mr. Simmons July 3 request for a fee waiver. The August 3 letter stated that: "We have determined that the information requested is primarily in the KWUA's commercial interest, based on the resource issues currently facing the organization in the Klamath Basin. The KWUA's tax-exempt status is not determinative. Moreover, the request seeks materials informative primarily to a narrow segment of interested persons rather than the general public. Thus, we conclude that the request does not meet the statutory fee waiver test in 43 C.F.R. § 2.21(a)." (Id. at 37).

In an August 5, 1996 letter, Mr. Simmons appealed the denial. (Id. at 2). Mr. Simmons incorporated by reference his arguments in support of a fee waiver stated in his appeal dated July 18, 1996. (Id. at 51). On December 19, 1996, the Department denied Mr. Simmons's August 5, 1996 fee waiver appeal. (Id. at 3, 53).



The denial stated that it was the Department's opinion that the disclosure was not likely to contribute to the public's understanding of the operations or activities of the BIA. (Id. at 54). The Department found that the Association's focus pertained to the interest of a small segment of interested persons, as opposed to the general public, and that to qualify for a fee waiver the release of the requested materials had to contribute to the understanding of the public at large. (Id.). The Department found that the Association was seeking the information for its own use to evaluate the proposals of the BIA and the Klamath Basin Tribes concerning the Klamath Project Operations Plan. (Id. at 55). The Department found that the fact that the Association would maintain the materials in a library did not demonstrate that the Association was planning to disseminate the material to the general public, and the Department was not aware of any interest in the material by the general public. (Id.). The Department also attached an opinion from the Office of the Solicitor further explaining the legal basis for the denial. (Id.).

Plaintiff has narrowed the list of documents in dispute to twelve items. (Plaintiff's memorandum in opposition at 1). Plaintiff concedes that the Vaughn index and declarations justify withholding 13 documents describe as notes prepared by BIA personnel. Plaintiff no longer seeks the release of seven items which the Bureau of Reclamation produced. (Plaintiff's memorandum at 10). Defendants have released five[2] of

[2] Plaintiff requests that the court take judicial notice that these five documents were released. Plaintiff's request for judicial notice is granted.

the twelve items, leaving the following seven items in dispute:

1) A January 19, 1996, facsimile from Klamath Tribes Department of Natural Resources(DNR) to Cathy Wilson (BIA)(Identified as Document No. 3, FOIA Appeal No. 96-168) is a position paper that discusses water law legal theories concerning the water rights of the federally recognized Indian Tribes of the Klamath Basin. (Vaughn Index at 10). It involves and contains the Tribes' analyses as to matters relating to the adjudication and/or development of a long-term operations plan. (Defendants' Exhibit 1 at 4). The document was prepared by the Tribes and was provided to the Department at the Department's request for use by the Department in the performance of its official duties, including departmental deliberations concerning the adjudication issues and its trust responsibility in developing a long-term plan of operations. (Id. at 4-5; Supplemental; Wilson affidavit at 1).

Catherine E. Wilson, water rights specialist with the BIA, requested that Carl (Bud) Ullman, Klamath tribal counsel, provide her with a copy of this document. (Supplementary declaration of Catherine Wilson at 1). She used this document in her work concerning the development of an operations plan for the Klamath Project. (Id. at 2).

The Solicitor asked Bud Ullman, an attorney for the Klamath Tribes, to develop the position paper. (Vaughn Index at 11; Supplemental Bergstrom declaration at 3). Mr. Ullman prepared the document and shared it with the Department because of the common interest of the Tribes and the Department in protecting tribal resources in the development of an operation plan



for the Klamath Project, in potential litigation arising from the operations plan development, and in the pending adjudication in Oregon. (Vaughn Index at 11). The Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Id.). The Department relied upon the document in deliberations. (Id.). The document was created and used to assist the Department in deliberations and decision-Freedom of Information Act (FOIA) making regarding the ongoing adjudication and development of a long-term plan for the Klamath Project. (Defendants' Exhibit 1 at 5).

The document addresses issues related to water rights of the tribes at issue in both the ongoing development of an operations plan for the Klamath Project and the pending adjudication. (Vaughn Index at 11). The Department used the document in its case preparation in connection with the adjudication and in addressing its trust responsibility in developing a long-term operations plan for the Klamath Project. (Defendants' Exhibit 1 at 5).

The document predates the filing of water rights claims on behalf of the Klamath Tribes in the Klamath Basin Adjudication, which were due to be filed April 30, 1997, as well as the issuance of an operations plan for the Klamath Project. (Vaughn Index at 11). Disclosure of the document would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, and thereby undermine the Department's ability to address water rights issues concerning the tribes. (Id.);

2) A January 24, 1996, draft memorandum from Cathy Wilson (BIA) to Tom Strekal and Doug Tedrick (BIA),

and Richard Cross, Yurok tribal attorney, and Bud Ullman, Klamath Tribal attorney, (Identified as Document No. 6, FOIA Appeal No. 96-168)[3] contains views on policy the BIA could provide to other governmental agencies concerning the obligation to protect Indian trust assets in developing an operations plan for the Klamath Project. (Id.). The memorandum considers proposing language as guidance regarding the trust responsibility. (Id.). The document satisfies exemption five because the Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Id.). The department relied upon the document in its deliberations. (Id.).

The memorandum predates the issuance of an operations plan. (Id.). The memorandum addresses issues related to the development of an operations plan for the Klamath Project. (Id. at 12). Disclosure of the document would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, and thereby undermine the Department's ability to develop an operations plan. (Id.);

3) A February 8, 1996, facsimile from Bud (Carl) Ullman, Klamath tribal attorney, to Tom Strekal of the BIA (Identified as Document No. 10, FOIA Appeal No. 96-168) contains comments on the USFWS proposals for listed species. (Id.). This paper expresses views concerning trust resources in light of the USFWS's proposal on listed species and the resulting implication

[3] Plaintiff points out that this is the only document from the United States to the Klamath Tribes. All the other disputed documents are from the Tribes to the United States.



on lake management. (Id.). The facsimile cover sheet was released. (Id.).

Thomas A. Strekal, a fish and wildlife biologist with the BIA, requested that Mr. Ullman forward him a copy of this document. (Supplemental Declaration of Thomas Strekal at 1). He used this document in his work concerning the development of an operations plan for the Klamath Project. (Id.).

The document satisfies exemption five because the Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Vaughn Index at 12). The Department relied upon the document in deliberations. (Id. at 12-13). The document predates the issuance of a plan of operations, and it addresses issues related to the development of an operations plan for the Klamath Project. (Id. at 13). Disclosure of the document would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, and thereby undermine the Department's ability to develop an operations plan. (Id.);

4) A May 23, 1996, letter from Bud (Carl) Ullman, Klamath tribal attorney, to Lynn Peterson, Regional Solicitor of the Pacific Northwest Region, (Identified as Document No. 16, FOIA Appeal No. 96-201) discusses the Klamath Basin Adjudication. (Vaughn Index at 18; Supplemental declaration of Barbara Scott-Brier at 1). It concerns the water rights claim being prepared on behalf of the Klamath tribes. (*Id.*). This document assisted the Department in its case preparation in connection with the water rights adjudication. (Supplemental declaration of Barbara Scott-Brier at 3). The letter satisfies exemption five because the Department con-

sults with the Klamath Tribes when departmental actions may affect trust resources. (Vaughn Index at 18). The Department relied upon the document in deliberations. (Id.).

The Office of the Solicitor asked Bud Ullman, an attorney for the Klamath Tribes, to develop the letter. (Id.; Supplemental declaration of Barbara Scott-Brier at 1). It was shared with the Department because of the common interest between the Tribes and the Department in protecting tribal trust resources in the pending adjudication in Oregon. (Vaughn Index at 18). The letter was prepared by the Tribe in consultation with and for use by the Department in the Department's deliberations concerning arguments to advance in the adjudication. (Defendants' Exhibit 4 at 3[4]). The Department used the letter in its case preparation in connection with the adjudication, and it was prepared at the recommendation of a Department employee. (Id.). The letter addresses issues related to the pending adjudication. (Vaughn Index at 18). It was provided to the Department prior to the Department filing its water rights claims on behalf of the Tribes in the adjudication. (Defendants' Exhibit 4 at 3). Disclosure of the letter would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, thereby undermining the Department's ability to address water rights

[4] Plaintiff objects to Ms. Scott-Brier's assertion that this letter was prepared by a tribal attorney. This fact only affects defendants' claim regarding attorney work-product doctrine. Even if the court were to strike this statement, it would still find that the materials were protected under the deliberative process exemption. In addition, defendants' Vaughn Index also states that this document was prepared by a tribal attorney.



issues concerning the tribes. (Vaughn Index at 18). Disclosure would expose sensitive litigation positions to be taken in the adjudication. (Id.);

5) A June 18, 1996 letter from Jeff Mitchell, Klamath Tribes Chairman, to Stan Speaks, BIA Area Director, with attachment (Identified as Document No. 20, FOIA Appeal No. 96-201) concerns the Klamath Tribes water rights. (Id. at 20). Ms. Scott-Brier, attorney-advisor for the Office of the Solicitor, requested that Mr. Mitchell, Chairman of the Klamath Tribes, send this letter and the attachment (Document No. 16, FOIA Appeal No. 96-201) to Mr. Speaks conveying the views of the Klamath Tribes concerning issues involved in the water rights adjudication. (Supplemental Declaration of Barbara Scott-Brier at 2). This document assisted the Department in its case preparation in connection with the water rights adjudication. (Id.). The letter satisfies exemption five because the Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Vaughn Index at 20). The Department relied upon the document in deliberations. (Id.). The document predates the filing of claims on behalf of the Klamath Tribe in the pending Oregon adjudication. (Id.). It addresses issues related to the water rights claims to be filed in the adjudication. (Id.). Disclosure of the document would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, thereby undermining the Department's ability to address water rights issues concerning the tribes. (Id.). Disclosure would expose sensitive litigation positions to be taken in the adjudication. (Id.);

6) A June 28, 1996 letter from Bud (Carl) Ullman, Klamath tribal attorney, to Stan Speaks, BIA Area Director, with attachment (Identified as Document No. 25, FOIA Appeal No. 96-201) concerns a Klamath Tribal Executive Committee resolution regarding the Tribes' water rights claims in the Klamath Basin Adjudication. (Id.). Ms. Scott-Brier requested that Mr. Ullman send this letter and the attached tribal resolution to Mr. Speaks. (Supplemental Declaration of Barbara Scott-Brier at 2). This document assisted the Department in its case preparation in connection with the water rights adjudication. (Id. at 3). The attachment is the Klamath Tribes' resolution regarding the Tribes' water rights claims in the Klamath Basin Adjudication. (Vaughn Index at 20). The documents satisfy exemption five because the Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Id. at 21). The Department relied upon the documents in deliberations. (Id.). The documents predate the filing of claims on behalf of the Klamath Tribe in the pending Oregon adjudication. (Id.). They address issues related to the water rights claim to be filed in the adjudication. (Id.). Disclosure of the documents would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, thereby undermining the Department's ability to address water rights issues concerning the tribes. (Id.). Disclosure would expose sensitive litigation positions to be taken in the adjudication. (Id.); and

7) A July 1, 1996, memorandum from Jacob Kahn (Klamath Tribes) to Cathy Wilson (BIA)(Identified as Document No. 27, FOIA Appeal No. 96-201) concerns the biological factors affecting trust resources. (Id. at



22). The Department released a one page facsimile cover sheet that accompanied the memorandum. (Defendants' Notice of Filing of Fee Waiver Documents at 8). Catherine Wilson, water rights specialist with the BIA, requested a copy of this document from Jacob Kahn, tribal biologist. (Supplemental declaration of Catherine Wilson at 2). She used this document in connection with her work concerning the development of an operations plan for Klamath Project. (Id.). The document satisfies exemption five because the Department consults with the Klamath Tribes when departmental actions may affect trust resources. (Vaughn Index at 22). The Department relied upon the document in deliberations. (Id.). The document predates the issuance of a plan of operations. (Id.). It addresses issues related to the development of an operations plan. (Id.). Disclosure of the document would expose the Department's decision making process in such a way as to discourage candid discussions within the Department, thereby undermining the Department's ability to develop an operations plan. (Id.). Disclosure would expose technical opinions deemed critical to analyzing the extent of the Department's trust responsibility. (Id.).

The remaining documents consist of communications between the Tribes and the Department. (Supplemental Bergstrom declaration at 2). They address the nature and extent of the Tribes' trust resources and the concurrent trust obligation owed by the Department to the Tribes in the development of an operations plan for the Klamath Project and in the pending adjudication of the Klamath River Basin. (Id.). Release of the documents would significantly harm the Department's position in the pending adjudication as well as the Depart-

ment's ability to complete its internal decision making regarding a more long-term Operations Plan for the Klamath Project. (Id.).

The documents contain recommendations, opinions, and frank discussions on various issues, including analyses of legal issues in the adjudication and/or operations plan development. (Id.). Release of the documents would reveal to the public, and to potential adversaries, the preliminary views and litigation strategy before the Department's policy and legal determinations on the matters have been finally determined. (Id.). Release would disrupt and chill the Department's ability to perform its required consultation with the Tribes as well as the Department's ability to complete its internal deliberations to determine its position regarding the nature and extent of the Tribes trust resources and the Department's trust responsibility. (Id. at 2-3).

Scott Bergstrom, attorney-advisor within the Office of the Solicitor, reviewed the documents at issue to determine if there were portions that were segregable. (Second Supplemental Bergstrom affidavit at 1-3). All segregable portions were released. (Id.). The factual information contained in the remaining documents is inextricably connected to the deliberative material, and disclosure would expose or cause harm to the BIA's deliberations. (Id. at 3).

The United States and the Department of the Interior have a trust responsibility to protect the rights and resources of the Indian Tribes. (Defendants' Exhibit 1 at 2). The documents submitted to the Department discuss issues regarding the Department's trust responsibility toward the Tribes in light of the development of a long-term operations plan for the Klamath Project and/or presently ongoing adjudication. (Id.).



It has been the policy and practice of the Department to consult with tribes when those rights and resources are impacted by federal actions. (Defendants' Exhibit 1 at 2, 9-10, 12-13, 15-16). Under the Departmental Manual, any information received from the tribes through the consultation process is "deemed confidential, unless otherwise provided by applicable law, regulations, or administrative policy, if disclosure of that information would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government (s)." (Id. at 13).

The Bureau of Reclamation, Fish and Wildlife Service, National Marine Fisheries Service, and the Bureau of Indian Affairs entered into a government-to-government agreement with the Klamath Basin Tribes regarding the development of the Klamath Project Operations Plan. (Id. at 18-23). Under the terms of the agreement, the Klamath Basin Tribes stands in the role of consultants to the Department on the issue of development of the Klamath Project. (Id. at 18, 20).

In connection with water rights claims filed by the United States on behalf of the Tribes and the development of a long-term operations plan for the Klamath Project, the Department entered into ongoing consultations with the Tribes to ensure that the Department would be fully informed of the Tribes' views and would have the Tribes' analysis available for decision making. (Id. at 3). The consultation involved discussion of legal analyses and theories regarding the scope of the water rights claims to be filed in the adjudication and

the manner in which the Department's trust responsibility affects the operations of the Klamath project. (Id. at 3-4).

In a memorandum dated September 26, 1994, James K. Bryant, an employee of the Bureau of Reclamation, noted that the Klamath Tribes were concerned that the water level of the Upper Klamath Lake was too low and the fish in the lake were in a stressful condition. (Simmons Declaration Exhibit B at 2). The Klamath Tribes wanted the Bureau of Reclamation to provide them with a water budget. (Id.). The Klamath tribes were "contemplating a lawsuit with Reclamation over Indian Trust and ESA (Endangered Species Act) responsibilities." (Id.).

In December of 1994, Marvin Garcia of the Klamath Tribe sent the Secretary of the Interior a letter requesting the reinitiation of formal consultation pursuant to section 7 of the Endangered Species Act and giving the Secretary the required 60-day notice of violation and intent to sue under the Endangered Species Act. (Simmons Declaration Exhibit C). The letter complained about the effect of the operation of the Klamath Irrigation Project by the Bureau of Reclamation on two endangered fish species that inhabited the Upper Klamath Lake. (Id.).

In September of 1996, Elwood Miller, Jr. of the Klamath Tribe sent the Secretary of the Interior a 60-day notice of intent to sue for violation of the Endangered Species Act. (Simmons Declaration Exhibit N). This letter also criticized the Bureau of Reclamation's management of the Klamath Project and its detrimental effect on the two endangered fish species inhabiting the lake. (Id.).



## II. LEGAL STANDARDS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). The moving party bears the initial burden of proof. *See Rebel Oil Company, Inc. v. Atlantic Richfield Company*, 51 F.3d 1421, 1435 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 515 (1995). The moving party meets this burden by identifying portions of the record on file which demonstrates the absence of any genuine issue of material fact. *Id.*

In assessing whether a party has met their burden, the court must view the evidence in the light most favorable to the nonmoving party. *Allen v. City of Los Angeles*, 66 F.3d 1052 (9th Cir. 1995). All reasonable inferences are drawn in favor of the nonmovant. *Id.* If the moving party meets their burden, the burden shifts to the opposing party to present specific facts which show there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Auvil v. CBS "60 Minutes"*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1567 (1996). The nonmoving party cannot carry their burden by relying solely on the facts alleged in their pleadings. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1994). Instead, their response, by affidavits or as otherwise provided in Rule 56, must designate specific facts showing there is a genuine issue for trial. *Id.*

## III. DISCUSSION

Defendants move for summary judgment arguing that the correspondence between the tribes and the BIA meets exemption (b)(5) as either deliberative process material, attorney work product material, and/or attorney client privilege material. Defendants argue that the BIA properly denied plaintiff's request for a fee waiver because the requests were unlikely to contribute to the public's understanding of the BIA's operations and activities. Plaintiff argues that: the documents withheld are not inter-agency or intra-agency documents; the deliberative process and/or attorney work-product privileges do not apply; the Department of Interior's trust obligation does not shield the documents from disclosure; the United States has failed to prove that it has disclosed all segregable material; and the United States wrongfully denied the fee waiver.

**FOIA Exemption(5)**

The Freedom of Information Act, 5 U.S.C. § 552 requires government agencies to disclose to the public any requested documents. 5 U.S.C. § 552(a). The government agency must disclose the document unless it falls within one the nine enumerated exemptions found in 5 U.S.C. § 552(b). *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1082, 1085 (9th Cir. 1997) (citation omitted). Theses nine exemptions are "explicitly exclusive" and "narrowly construed." *Id.* (citations omitted). "FOIA 'does not authorize withholding of information or limit the availability of records to the public, except as specifically stated'." *Id.* at 1087 (citing 5 U.S.C. § 552(d)).



FOIA creates a presumption in favor of disclosure. *Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State*, 818 F. Supp. 1291, 1295 (N.D. California 1992). The government agency has the burden of proving that the requested document falls within one of FOIA's exemptions. *Maricopa Audubon Society*, 108 F.3d at 1085 (citing 5 U.S.C. § 552(a)(4)(B)). To meet that burden, the agency must present oral testimony or affidavits that are detailed enough for the court to assess the government's claim of exemption. *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1089, 1092 (9th Cir. 1997). The agency may also compile a "Vaughn Index." *Maricopa Audubon Society*, 108 F.3d at 1092.

If the agency relies on affidavits, the affidavits must contain a reasonably detailed description of the documents and allege facts sufficient to establish the exemption. *Id.* In the affidavits or the Vaughn Index, the agency must describe each document, or portions withheld, discuss the consequences of disclosing the sought after information, discuss segregability, and discuss whether the material was relied upon in making a decision. *See Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State*, 818 F. Supp. 1291, 1296-1297 (N.D. Cal. 1992). "The agency bears the burden of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process." *Id.* (citation omitted).

Exemption 5 exempts from disclosure any "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C.

§ 552(b)(5). Exemption 5 "shields documents 'normally privileged in the civil discovery context'" which "incorporates the attorney-client privilege, the attorney work-product privilege, and the executive 'deliberative process' privilege that protects candid internal discussion of legal or policy matters." *Maricopa Audubon Society*, 108 F.3d at 1084 fn.5 (citations omitted). It "does not apply to factual information, unless the release of the factual information would reflect or reveal the deliberative process, or to recommendations or opinions ultimately relied upon in subsequent agency action." *Bay Area Lawyers*, 818 F. Supp. at 1297 (citation omitted).

**Deliberative Process**

Defendants argue that the Tribes were acting in the role of consultants with regard to the documents in question, and therefore, under the "functional test" articulated in *Formaldehyde Institute v. Department of Health and Human Services*, 889 F.2d 1118 (D.C. Cir. 1989) and various other cases, the documents are protected under the deliberative process privilege. Defendants distinguish *Madison County, New York v. Department of Justice*, 641 F.2d 1036 (1st Cir. 1981), arguing that the Tribes in this case were not acting in an adversarial role and were not in active litigation with the government, but instead were acting as consultants. Defendants argue that the potential for an adversarial relationship does not negate the consultative relationship, citing *Public Citizen, Inc. v. Dept. of Justice and National Archives and Records Administration*, 1997 WL 191110 (D.C. Cir.) at *4. Defendants argue that: the consulting relationship assisted the government in fulfilling its trust obligations toward the



Tribes; consulting was undertaken pursuant to Executive and Departmental policy, the Tribes participation assisted them in making decisions concerning the development of the Operations Plan and preparing of water rights claims in the Oregon stream adjudication; and the documents originating with the Tribes were provided at the Department's request. Defendants argue that the court in the *County of Madison* recognized that the situation is an entirely different matter when the government approaches a third party to obtain information for the benefit of the agency.

Plaintiff argues that under *County of Madison* the documents in question do not qualify as inter-agency or intra-agency documents. Plaintiff argues that: the Tribes approached the government with their own interests in mind; they aggressively advocated the reallocation of water to benefit them; they've made political overtures to the Office of the Secretary; they've threatened to file lawsuits; they've prepared technical reports; they've demanded that irrigation diversions be shut off; and they've combined their advocacy with environmental groups.

The deliberative process privilege allows agencies to "freely explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." *Assembly of the State of California v. United States Department of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). "In order to be protected by the deliberative process privilege, such a document must be both 'predecisional' and 'deliberative'." *Id.* (citation omitted). The deliberative process privilege was created "to protect the deliberative process of government, by ensuring that persons in an advisory role would be able to

express their opinions freely to agency decision-makers without fear of publicity." *Formaldehyde Institute v. Department of Health and Human Services*, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (citation and quotations omitted).

The privilege encompasses the opinions and recommendations of temporary consultants, as well as its own employees. *Id.* "[E]fficient government operation requires open discussions among all government policymakers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects." *Id.* (citation and quotations omitted). Under the deliberative process privilege, the terms "'inter-agency' and 'intra-agency' are not rigidly exclusive terms, but rather embrace any agency document that is part of the deliberative process." *Id.* at 1123 (citation and quotations omitted).

"Whether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations. If information communicated is deliberative in character, it is privileged from disclosure, notwithstanding its creation by an outsider." *Id.* (Citation and quotations omitted).

A document is deliberative "if the disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Maricopa Audubon Society*, 108 F.3d at 1093. (Citation and quotations omitted). This test focuses on the effect of releasing the documents. *Id.* at 1094. The court must examine what harm, if any, the release of the document would do to



the agency's deliberative process. *Formaldehyde Institute*, 889 F.2d at 1122. The court determines whether disclosure would be "likely in the future to stifle honest and frank communication within the agency." *Maricopa Audubon Society*, 108 F.3d at 1094 (citation and quotations omitted). The court also looks at the context in which the materials were used or what role they played in the deliberative process. *Formaldehyde Institute*, 889 F.2d at 1124.

The court finds that all the documents in question qualify as inter-agency or intra-agency documents under the "functional test". All the documents played a role in the agency's deliberations with regard to the current water rights adjudication and/or the anticipated Plan of Operations. Most of the documents were provided to the agency by the Tribes at the agency's request. Disclosure of these documents would expose the agency's decision-making process and discourage candid discussion within the agency undermining the agency's ability to function. (Vaughn Index at 11, 12-13, 18, 20-21; Defendants' Exhibit 1 at 5; Defendants' Exhibit 4 at 3-4; Supplemental Bergstrom affidavit at 2-3).

The court finds that *Madison County* is distinguishable from this case. In our case, the Tribes are not in current litigation with the government, but instead acted in the role of consultants. Most of the documents were provided to the government at their requests. The government used all these documents in fulfilling their trust obligation, and as part of their decision making process. The court finds that the fact that the Tribes may, in the future, become potential litigants does not change their current status as consultants

acting in cooperation with the agency. *See Public Citizen, Inc. v. Dept. of Justice and National Archives and Records Administration*, 1997 WL 191110 (D.C. Cir.) at *4.

Defendants argue that the documents are predecisional and deliberative. They predate any decision on the Plan of Operations for the Klamath Project and the final decision on the position of the United States in the stream adjudication. Disclosure of the documents would expose the Department's decision making process with regard to the development of the Plan of Operations, and it would expose the development of the Department's legal position in the ongoing adjudication on behalf of the Tribes. Release of the documents would inhibit the ability of the Department and the Tribes to communicate freely and openly.

Plaintiff argues that the documents are not predecisional because there is no definite date for completion of the Plan of Operation, no definite schedule for completion, and no written work schedule. Plaintiff argues that the defendants have failed to demonstrate how and why disclosure of the documents could adversely expose the decision making process.

"A predecisional document is one prepared in order to assist an agency decision-maker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Maricopa Audubon Society*, 108 F.3d at 1093 (citation and quotations omitted). "[T]he agency must identify a specific decision to which the document is predecisional." *Id.* at 1094. Material which predates a decision chronologically, but did not contribute to the decision, is not predecisional. *Assembly of the State of California v. United States Department of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992). Material which may be used in making a possible decision at some undisclosed time in the future does not qualify as predecisional material. *Id.* (citation omitted).



Document No. 3 FOIA Appeal No. 96-168, Document No. 16 FOIA Appeal No. 96-201, Document No. 20 FOIA Appeal No. 96-201, and Document No. 25 FOIA Appeal No. 96-201 predate the Department's decision regarding the filing of water rights claims on behalf of the Tribes in the ongoing adjudication. (Defendants' Exhibit 1 at 5, Vaughn Exhibit at 18 and 21). These documents were relied upon in deliberations regarding the Department's decision to file claims in the adjudication. (Id. at 11, 12-13, 18, 20-21; Defendants' Exhibit 1 at 5). Document No. 6 FOIA Appeal No. 96-168, Document No. 10 FOIA Appeal No. 96-168, and Document No. 27 FOIA Appeal No. 96-201 predate the Department's release of a Plan of Operations for the Klamath Project which is scheduled for completion and release in 1999. (Vaughn Index at 11, 13, 21). These documents were relied upon in the Department's deliberations. (Id. at 11, 12-13, 21). Based on these facts, the court finds that these documents are predecisional.

**Attorney Work Product**

Defendants argue that document No. 3, FOIA Appeal No. 96-168 and document No. 16, FOIA Appeal No. 96-201 are protected by the attorney work-product exemption. Defendants argue that these documents were prepared by an attorney for the use of the Solicitor's

Office in his deliberations in contemplation of litigation in the ongoing stream adjudication and the development of the Plan of Operations and at the request of Department attorneys. Defendants argue that the attorney work-product privilege applies to the entire document because the analysis is inextricably linked to the Department's legal strategy in the adjudication.

Plaintiff argues that the BIA must prove that the documents in question were prepared by an attorney in contemplation of litigation and explain why the privilege applies to all portions of the document. Plaintiff argues that document No. 3 FOIA Appeal No. 96-168 and document No. 26 FOIA Appeal No. 96-201 were not prepared by an attorney, and that Bergstrom's assertion that document No. 26 was prepared by Bud Ullman is not based on personal knowledge. Plaintiff argues that the description of these documents is inconsistent, and that to the extent that the documents relate to an ongoing administrative process and an anticipated administrative decision, they are not prepared in anticipation of litigation.

Exemption 5 permits the withholding of memorandums and letters which would not be available by law to a party other than an agency in litigation. *Church of Scientology International v. United States Department of Justice*, 30 F.3d 224, 230 (1st Cir. 1994). This exemption includes the attorney work-product privilege. *Maricopa Audubon Society*, 108 F.3d at 1084 fn.5 (citations omitted). The privilege applies to memorandum, prepared by an attorney or under the direction of an attorney, in contemplation of litigation, which sets forth the theory of the case or the litigation strategy. *Exxon Corp. v. Dept. of Energy*, 585 F. Supp. 690, 700



(D.D.C. 1983); *Exxon Corp. v. Federal Trade Commission*, 466 F. Supp. 1088, 1099 (D.D.C. 1978), *affirmed*, 663 F.2d 120 (D.C. Cir. 1980). "An agency seeking to withhold a document in its entirety under this exemption must identify the litigation for which the document was created and explain why the work-product privilege applies to all portions of the document." *Church of Scientology*, 30 F.3d at 237. "For a document to have been prepared in contemplation of litigation, at the very least, some articulable claim, likely to lead to litigation, must have arisen." *Dept. of Energy*, 585 F. Supp. at 700 (citation and quotations omitted). "[A]dministrative litigation certainly can beget court litigation and may in many circumstances be expected to do so." *Id.* A document that was created for the primary motive of assisting in pending or impending litigation is protected by attorney work-product privilege. *See United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temporary Emergency Court of Appeals 1985). The work-product privilege still applies where the information has been shared with a third party that holds a common interest. *See Durham v. United States Dept. of Justice*, 829 F. Supp. 428, 433 (D.D.C. 1993), *appeal dismissed*, 1994 WL 704043 (D.C. Cir. 1994).

Document No. 3 FOIA Appeal No. 96-168 was prepared by Bud Ullman, an attorney for the Klamath Tribes, at the request of the Solicitor, an attorney for the government. (Vaughn Index at 11). The memorandum discusses legal theories concerning the water rights of the Tribes that are being asserted in the current state administrative adjudication of water rights to the Klamath River. (Id.). Release of this document would significantly harm the government's position in the ongoing adjudication, and would reveal to potential

adversaries the preliminary views and litigation strategy. (Supplemental Bergstrom declaration at 2). The document was prepared in anticipation of potential litigation that may arise out of the administrative adjudication or over the forthcoming Plan of Operations for the Klamath Project. (Vaughn Index at 11). Plaintiff has admitted that the issue of water rights has been and continues to be very contentious. (Plaintiff's memorandum at 3-6). It appears that the current administrative adjudication and the upcoming Plan of Operations are expected to spawn court litigation. Based on the above facts, the court finds that this document in its entirety is protected by the attorney work-product privilege.

Document No. 16 FOIA Appeal No. 96-201 is a letter composed by Bud Ullman a Klamath Tribe attorney. (Vaugh Index at 18). It concerns the Plan of Operations and the current water rights adjudication. (Id.). The Office of the Solicitor requested that Mr. Ullman prepare the letter. (Id.). It discusses arguments that were going to be advanced in the current water rights adjudication. (Defendants' Exhibit 4 at 3). Release of this document would significantly harm the government's position in the ongoing adjudication, and would reveal to potential adversaries the preliminary views and litigation strategy. (Supplemental Bergstrom declaration at 2). It was prepared in anticipation of potential litigation that may arise out of the administrative adjudication. (Defendants' Exhibit 4 at 3-4). Plaintiff has admitted that the issue of water rights has been and continues to be very contentious. (Plaintiff's memorandum at 3-6). It appears that the current administrative adjudication and the upcoming Plan of Operations are expected to spawn court litigation.



Based on the above facts, the court finds that this document in its entirety is protected by the attorney work-product privilege.

**Segregability**

Plaintiff argues that defendants have failed to prove that they disclosed all segregable material. Defendants argue that the Department has reviewed all the documents at issue to determine whether there are any reasonably segregable portions and that the cover sheets and other portions of the documents which could be disclosed without revealing the agency's deliberations or legal strategies were released.

Even if part of a document is exempt, the agency must disclose any segregable portions, and it must address, in the Vaughn Index or affidavits, why the remaining information is not segregable. *Bay Area Lawyers*, 818 F. Supp. at 1296. The court must make a specific finding on the issue of segregability, and the court cannot approve the withholding of the entire document without making a finding on segregability. *Id.* (citation omitted).

Scott Bergstorm, attorney-advisor within the Office of the Solicitor, reviewed the documents at issue to determine if there were portions that were segregable. (Second Supplemental Bergstorm affidavit at 1-3). All segregable portions were released. (Id.). The factual information contained in the remaining documents is inextricably connected to the deliberative material, and disclosure would expose or cause harm to the BIA's deliberations. (Id. at 3). Based on this evidence, defendants' motion for summary judgment with regard to the issue of segregability should be granted.

**Fee Waivers**[5]

5 U.S.C. § 552 (a) (4) (iii) provides that documents are to be furnished without charge or at a reduced rate if the disclosure is likely to contribute significantly to the public's understanding of government operations or activities, and the disclosure is not primarily in the commercial interest of the requester. *McClellan Ecological Seepage Situation (MESS) v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). The fee waiver statute "is to be liberally construed in favor of waivers for non-commercial requesters". *Id.* (citation omitted). The main purpose of this provision "was 'to remove the roadblocks and technicalities which have been used by various federal agencies to deny waivers or reductions of fees under FIOA'". *Id.* (citation omitted)

Defendants argue that plaintiff is seeking the information for its own use. Plaintiff has failed to demonstrate that disclosure of the information is in the public interest and that it will contribute to public's understanding of the operation or activity. Defendants argue that the plaintiff's pledge to maintain the information in its library is insufficient to demonstrate that the information will be communicated to the public. Defendants argue that plaintiff has failed to provide specific information establishing that it is entitled to a fee waiver.

Plaintiff argues that the defendants wrongfully denied its request for a fee waiver because the withheld documents are likely to contribute to the public's

[5] In an action by a requester regarding a fee waiver under 5 U.S.C. § 552, the standard of review is de novo, and the court's review is limited to the record before the agency. 5 U.S.C. § 552 (a) (4) (vii).



understanding of the Department's operation the Klamath Project and related activities. Plaintiff argues that it made the required prima facie showing to be entitled to a fee waiver. Plaintiff argues that disclosure of the information is in the public interest and is not primarily in its commercial interest.

The requester of a fee waiver has the initial burden of identifying the public interest to be served by disclosure of the documents. *Id.* at 1285 (citation omitted). "[A]n agency may infer lack of substantial public interest 'when a public interest is asserted but not identified with reasonable specificity, and circumstances do not clarify the point of the requests'". *Id.* (citation omitted). Requesters must explain with reasonable specificity how disclosure will contribute to public understanding. *Id.* Conclusory statements of public interest will not suffice. *Id.*

In *MESS*, the request for a fee waiver provided the following information: the requesters sought to benefit the general public, especially in Sacramento; the information might be used in litigation to ensure agency compliance with federal laws; and the information would be donated to a public institution. *Id.* The court found that the "requesters do not explain with reasonable specificity how disclosure will contribute to public understanding." *Id.*

In evaluating the request, the court found that: although the information sought was not new, it could support oversight of agency operations; disclosure of the information would result in only limited public understanding; the requesters gave no indication of their ability to understand and process the information; the record did not reveal whether the requesters had a

history of disseminating such information, either through public lawsuits or other means; the requesters gave no details about their intention to disseminate the information; the requesters did not state on what basis they would ensure agency compliance with particular federal laws or regulations; and the requesters failed to name a public institution to which they might donate the information. *Id.* The court found that an organization's identity and history, ability to absorb and disseminate information, and specific plans to use the information are all relevant to the assessment of whether disclosure is likely to contribute significantly to the public's understanding. *Id.* at 1287.

In *ONRC v. BLM*, 92-6425-TC (D. Oregon 1994 - Order dated April 22, 1994), the original request for a fee wavier stated: "ONRC is a nonprofit, tax-exempt Oregon corporation and has been determined to be operating in the public interest by the US Departments of Agriculture, Interior, Treasury, and Postal Service." *ONRC*, slip opinion at 2. The administrative appeal stated:

> "All of the information requested will be shared with ONRC's members or other members of the public that may express an interest to us in reviewing this information.
>
> ONRC, a 501(c) (3), nonprofit, tax-exempt corporation, is the coordinating structure for conversation, sportsmen, education, outdoor recreation, and commercial organizations concerned about Oregon's lands, waters, and natural resources. Organized in 1972 and incorporated in 1974, ONRC is a statewide association of 90 member organizations and more than 3000 individual members. ONRC educates the



> public about natural resource values and works to provide for effective public involvement concerning natural resource related issues and concerns.
>
> ONRC clearly meets these criteria and has been determined to be operating in the public interest by the U.S. Departments of Agriculture (Forest Service), Interior (Bureau of Land Management and National Park Service), Treasury (Internal Revenue Service), and the U.S. Postal Service.
>
> ONRC requests this information as being necessary to assist us in the evaluation of road construction practices and forest planning in these districts. The disclosure of this information will therefore 'likely contribute to an understanding of government operations or activities' and contribute 'to an understanding of the subject by the general public.'
>
> The subject of this request clearly concerns government activities. Disclosure of the requested information will (in particular) contribute significantly to the public understanding of the possible impact of road construction in and around these Districts, as well as the possibility of gaining information about the forest management practices of the Bureau of Land Management. *Id.* at 3.

Judge Hogan found that the request "does not sufficiently specify why plaintiff is requesting the documents or how the purpose of the request is in the public interest. The general purposes identified in plaintiff's appeal do not significantly expand on what the BLM is already directly providing to the public." *Id.* at 4. Judge Hogan stated that "plaintiff should more specifically identify a public interest not already sufficiently

served or capable of accomplishment under the status quo", and "plaintiff should demonstrate specifically how obtaining the specific documents will contribute to the public understanding of the operations of the government." *Id.* He also required plaintiff to identify the area, scope, aspect, or practice in a narrow rather than expansive way. *Id.*

Under the standards set forth in *MESS* and *ONRC v. BLM*, plaintiff has provided insufficient information to meet its prima facie burden of showing eligibility for a fee waiver. Plaintiff gave no indication of its ability to understand and process the requested information. There is no indication that the plaintiff has a history of disseminating information. The only detail given with regard to dissemination was that the information would be kept in a library where the public would have access. The plaintiff gave no details on how it planned to use the information or how the request was in the public interest. Since plaintiff has failed to make a prima facie showing of eligibility, defendants are entitled to summary judgment on the fee waiver claim. *See Friends of the Coast Fork v. United States Department of the Interior*, ___ F.3d ___, 1997 WL 149255 (9th Cir.) At *2.

## IV. RECOMMENDATION

Based on the foregoing, it is recommended that defendants' motion for summary judgment be granted.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have ten days from



the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have ten days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

Dated this 19 day of June, 1997.

/s/ JOHN P. COONEY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 97-36208
D.C. No. CV-96-03077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
PLAINTIFF-APPELLANT

*v.*

UNITED STATES DEPARTMENT OF THE INTERIOR;
BUREAU OF INDIAN AFFAIRS, DEFENDANTS-
APPELLEES

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[Filed: Dec. 22, 1999]

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**ORDER**

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Before: KLEINFELD, HAWKINS, Circuit Judges, and SCHWARZER,[1] District Judge.

Judges Kleinfeld and Schwarzer have voted to deny appellee's petition for rehearing. Judge Hawkins voted to grant the petition for rehearing. Judge Kleinfeld has voted to deny the petition for rehearing en banc and Judge Schwarzer so recommends. Judge Hawkins voted to grant the petition for rehearing en banc.

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[1] The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.



The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc is DENIED.

Supreme Court, U.S.
FILED
JUL 21 2000
CLERK

No. 99-1871

In The

# Supreme Court of the United States

UNITED STATES DEPARTMENT
OF THE INTERIOR AND UNITED STATES
BUREAU OF INDIAN AFFAIRS,

*Petitioners,*

v.

KLAMATH WATER USERS
PROTECTIVE ASSOCIATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether seven items of correspondence between (1) certain Indian Tribes located in the Klamath River Basin, and (2) the Department of Interior and the Bureau of Indian Affairs, in connection with ongoing administrative and adjudicative proceedings involving water rights and water allocations affecting the Tribes' interests, are "inter-agency or intra-agency" documents that are exempt from disclosure under exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5).

## PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

All of the parties to this proceeding are correctly identified in the caption. Respondent Klamath Water Users Protective Association is a not-for-profit corporation, and has no related corporate entities.



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## RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Klamath Water Users Protective Association (the "Association") respectfully submits this brief in opposition to the petition for writ of certiorari filed in this case by Petitioners United States Department of Interior ("Interior") and United States Bureau of Indian Affairs ("BIA") (collectively referred to herein as the "United States").

## OPINIONS AND JUDGMENTS BELOW

The opinion of the court of appeals (Petitioners' Appendix ("Pet. App.") 1a-30a) is reported at 189 F.3d 1034 (9th Cir. 1999). The order of the court of appeals denying Petitioners' petition for rehearing with suggestion for rehearing en banc is unreported (Pet. App. 72a-73a), and was entered on December 22, 1999.

## JURISDICTIONAL STATEMENT

The jurisdiction in the district over claims against the United States was invoked pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 702, and 28 U.S.C. §§ 1331, 1361, 2201-2202. The jurisdiction in the court of appeals for the Ninth Circuit was invoked pursuant to 28 U.S.C. § 1291. On June 8, 2000, the Chief Clerk of this Court extended the time for filing this brief in opposition to and including July 21, 2000. This Court's jurisdiction is invoked by the United States pursuant to 28 U.S.C. § 1254(1).

## STATEMENT

The United States' statement of the case in its petition is incomplete in several respects, and misleading in others. As a result, pertinent aspects of the case that the United States has either omitted or mischaracterized are discussed below.

The Association is a non-profit corporation formed under section 501(c)(5) of the Internal Revenue Code. 26 U.S.C. § 501(c)(5). Most of the members of the Association have contracts with the U.S. Bureau of Reclamation ("Reclamation") providing for the delivery of water through Klamath Irrigation Project facilities. Of these, most are public agencies, primarily irrigation districts, that use water from the Upper Klamath Lake and Klamath River. The Association provides information and representation for its members on matters in which they have a common interest, including water resources, agriculture, and other resources issues in or affecting the Klamath River Basin in northern California and southern Oregon.

The Association brought this action pursuant to FOIA, 5 U.S.C. § 552 *et seq.*, to obtain certain documents withheld by the United States that are related to certain contentious disputes regarding water resources in the Klamath River Basin. These disputes include: (i) Reclamation's development of the so-called Klamath Project Operations Plan ("KPOP"), a long-term plan to operate the Klamath Project facilities according to the purported legal obligations of Interior; and (ii) the ongoing Klamath Basin Water Rights Adjudication pending before the State



of Oregon. *See United States v. Oregon*, 44 F.3d 758, 764 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995).

Several Native American Tribes, including the Klamath Tribes, the Hoopa Tribe, the Karuk Tribe, and the Yurok Tribe (collectively, "Klamath Basin Tribes" or "Tribes"), are involved in these two disputes in order to protect their asserted natural resources claims related to the Klamath River and/or Klamath Lake. The approaches or management advocated by the Tribes within these disputes is often detrimental to Association members, since the Tribes' demands would make water unavailable for irrigation. The Klamath Basin Tribes have consistently sought to influence Interior agencies to take water away from Association members and to allocate more water to instream use for the purported benefit of the Tribes. Excerpts of Record ("ER") 273, 290, 322. The Tribes have threatened litigation against the United States, and have exerted an enormous amount of argument and political pressure to force this reallocation of water. ER 276, 290, 323-332, 372-374, 378-380. The Tribes are interested parties, and capable advocates; they are *not* neutral advisers or consultants to the United States. In fact, the Tribes and Interior have each hired their own consultants to assist them in representing their individual interests in the Klamath Basin, and the Tribes, the Association, and the public at large were specifically excluded from the ultimate agency deliberations at issue. ER 273-276, 372-374.

This case arose after the Association submitted several FOIA requests to Interior agencies, including the BIA, for documents provided to or received from the Klamath Basin Tribes pertaining to water resources issues in the Klamath River Basin. These requests were made, in

part, to discern what information was being exchanged during Reclamation's preparation of the draft KPOP. *See* Pet. App. 3a. In addition, the Association's FOIA requests were made only after Interior had freely provided to the Tribes, pursuant to the Tribes' own earlier FOIA requests, copies of communications between the Association and its members, and the United States regarding the KPOP and the water rights adjudication. ER 283, 365-371.

In responding to the Association's FOIA requests, the BIA released some documents, but refused to disclose approximately forty (40) responsive documents on the grounds that they were exempt from disclosure pursuant to the FOIA exemption 5. ER 23-30, 64-73. Shortly after the Association filed its complaint in district court, the BIA subsequently released several of the initially withheld documents. These included documents that were presented by the Klamath Basin Tribes at a *public meeting*, which the Association was invited to attend. ER 37-38, 486-494. They also included a letter from a tribal attorney to a tribal member. ER 487, 497-499. Under even the most narrow reading of the FOIA, these documents were not exempt from disclosure. The Association should not, nor should any other member of the public, be required to file a federal district court lawsuit in order to obtain documents that are so obviously subject to release. The fact that BIA withheld these documents initially is indicative of the United States' consistent failure in this case to comply with the broad disclosure policies of FOIA.

Subsequently, the BIA released additional documents that had been initially withheld, and the Association withdrew its request as to certain other withheld documents that were either (i) provided by another Interior



agency (i.e., Reclamation), or (ii) were eventually described in enough detail in the United States' *Vaughn* index (*see Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)) and declarations, to satisfy the Association that the documents were likely exempt.[1]

The seven documents remaining in dispute, consisting of a total of 31 pages, are identified as correspondence between (i) the BIA and/or Interior personnel, and (ii) Klamath Basin Tribes representatives or organizations. These documents are described in the United States' *Vaughn* index as (i) memoranda provided by the Tribes to Interior for use in the development of the KPOP, (ii) a memorandum from Interior to the Tribes concerning the government's trust obligations in developing the KPOP, and (iii) memoranda from the Tribes to Interior addressing claims in the water rights adjudication. *See* Pet. App. 6a-7a; *see also* Index to Documents Remaining in Dispute,

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[1] In this regard, the United States' *Vaughn* index confirmed, for the first time, that 13 of the initially withheld documents were notes prepared by BIA personnel. ER 123-132. These notes evidence the Klamath Basin Tribes' continuing attempts to influence the Interior's decisions regarding Klamath Project operations. The descriptions of these documents exacerbate the Association's concern that BIA employees may, in fact, have been communicating with the Tribes' attorneys with respect to contents of the draft KPOP under internal review in Interior. The Association believes this would be a significant act of bad faith, as Interior agencies repeatedly gave assurances that neither Tribes nor other interested parties would have access to the internal draft. However, the Association conceded that the United States' *Vaughn* index and declarations justified withholding these particular documents under the FOIA, exemption 5.

attached hereto as Exhibit 1a to Appendix to Brief in Opposition ("Opp. App.").[2]

The FOIA sets forth only nine specifically enumerated categories of records that are exempt from FOIA's disclosure requirements. 5 U.S.C. § 552(b)(1)-(9). As the court of appeals emphasized,

> [w]hen a [FOIA] request is made, an agency may withhold a document only if it falls within one of the nine statutory exemptions in § 552(b), and these exemptions " 'must be narrowly construed' in light of the FOIA's 'dominant objective' of 'disclosure, not secrecy.' " [Citing] *Church of Scientology v. Department of the Army*, 611 F.2d 738, 741 (9th Cir. 1980), quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Pet. App. 6a.

This case, of course, involves exemption 5 of the FOIA, which shields from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The United States continues to withhold these seven documents, and all portions of them, on the alleged grounds that the Klamath Basin Tribes are essentially "consultants" of Interior due to their trust relationship, and that the correspondence between the United States and the Tribes, therefore, meet the so-called "functional test" of

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[2] This index was attached as an exhibit to the Association's reply brief on the merits in the Ninth Circuit, without objection by the United States.



"inter/intra-agency" communications. *See Formaldehyde Institute v. Department of Health and Human Services*, 889 F.2d 1118, 1122 (D.C. Cir. 1989). As a result, the United States continues to assert that the documents are exempt from disclosure pursuant to the deliberative process privilege and/or attorney work-product privilege under the FOIA exemption 5. *See* 5 U.S.C. § 552(b)(5).

The court of appeals rejected these arguments based upon the unique and limited factual circumstances of this case. At the outset, the court of appeals declined to apply the "functional test" expansion of FOIA exemption 5, finding that this case is quite distinguishable from those where the "functional test" has been applied. In this regard, the court of appeals emphasized that the Tribes have asserted conflicting claims against the Association, and that the Tribes have a direct interest in the subject matter of the consultations – e.g., Interior's decisions with respect to the KPOP and the adjudication. Pet. App. 8a. On this latter point, the court of appeals emphasized that "consultation with the tribes is not similar to 'the advice from staff assistants and exchange of ideas among agency personnel' that forms the object of exemption five . . . " Pet. App. 9a.

The court of appeals also emphasized that the United States exercises fiduciary obligations to the Tribes in the context of governing statutes, and that "while it must act in the interests of the tribes, it may not afford them greater rights than they would have under the regulatory scheme. *See Skokomish Indian Tribe v. Federal Energy Regulatory Comm'n*, 121 F.3d 1303, 1308 (9th Cir. 1997)." Pet. App. 10a. In addition to the requirement that FOIA's exemptions must be narrowly construed, the court of

appeals attached significance to the executive branch's own written policies requiring that for the types of consultations in this case, "[a]ll such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals." Pet. App. 10a, *see also* ER 250-253.

Finally, the United States' petition neglects to state that, excepting Judge Hawkins, the dissenting judge in the court of appeals, not a single judge of the Ninth Circuit court of appeals requested a vote on the United States' petition for rehearing en banc. *See* Pet. App. 72a-73a.

## REASONS FOR DENYING THE WRIT

There is no circuit court conflict concerning the applicability of the FOIA exemption 5 to communications between tribal interests and federal agencies. Moreover, all circuit courts that have addressed the issue recognize that when an adversarial, non-neutral relationship exists, the FOIA exemption 5 does not apply. The United States has not established an adequate basis to justify the exercise of this Court's discretionary jurisdiction, and plenary review by this Court is not warranted.

Contrary to the United States' alarmist assertions about the potential far-reaching effects of the court of appeals decision, it is the United States' own petition that requests that this Court drastically depart from controlling case law and executive branch policy, and expand the



scope of the FOIA exemption 5. The United States essentially requests this Court to legislate a whole new exemption to the FOIA based upon the trust relationship between the Klamath Basin Tribes and the United States. Taking the United States' arguments to their logical conclusion would essentially broaden the FOIA's exemption 5 to include virtually any communications between interested beneficiaries in federal programs and the federal agencies which oversee such programs. This significant expansion of the FOIA exemption 5 is directly contrary to the mandates that FOIA's exemptions be narrowly construed. Any such expansion must be left to Congress.

Finally, the United States' assertions are fatally flawed in that they rest upon the faulty premise that some sort of trustee-beneficiary privilege exists within the purview of the FOIA exemption 5. For the foregoing reasons and as detailed below, the United States' petition for writ of certiorari should be denied.

### A. There Is No Conflict Between The Circuit Courts, And All Courts That Have Addressed The Issue Agree That Under The Unique and Limited Factual Circumstances Of This Case, The FOIA Exemption 5 Would Not Apply.

FOIA exemption 5's threshold test requires that the documents be "inter-agency or intra-agency" correspondence. *See* 5 U.S.C. § 552(b)(5); *see also County of Madison, N.Y. v. United States Dept. of Justice*, 641 F.2d 1036, 1043 (1st Cir. 1981) ("Once a communication is found to meet the intra- or inter-agency criterion, it must then be examined to see if any privilege shields it from

disclosure . . . "). It is undisputed that none of these withheld documents are literally "inter-agency or intra-agency" documents. Instead, six of the seven withheld documents are correspondence from the Tribes (or their representatives) to federal personnel. The remaining document is a memorandum from a BIA staff person to other BIA staff persons and to private attorneys hired by the Klamath Basin Tribes. *See* Opp. App. 1a. Nevertheless, the United States implores that the "inter/intra-agency" threshold test was met due to the "consultative relationship" between the United States and the Klamath Basin Tribes based upon their trustee-beneficiary relationship, and the actual role of the documents in the BIA's and Interior's deliberations.

The court of appeals flatly rejected this argument that the Tribes were acting in the role of consultants with respect to the disputed documents, and therefore, satisfied the so-called "functional test" articulated in *Formaldehyde Inst. v. Department of Health and Human Services*, 889 F.2d 1118 (D.C. Cir. 1989), and its related line of cases. ER 632. This "functional test" provides that under certain circumstances, the communications between agencies and their consultants are exempt from disclosure pursuant to the deliberative process privilege. *Formaldehyde Inst.*, 889 F.2d at 1122. The *Formaldehyde* case explains the functional test as follows:

> [E]fficient government operation requires open discussions among all government policymakers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects. Congress apparently did not intend "inter-agency" and "intra-agency" to be rigidly exclusive terms, but rather to include any *agency document* that is part of the deliberative process . . . [c]ourts have repeatedly found that a privilege attaches to reports of outsiders *commissioned* by an agency to perform agency work, when such reports would be protected if compiled within the agency itself. Whether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations. If information communicated is deliberative in character it is privileged from disclosure, notwithstanding its creation by an outsider.



*Id.* at 1122. (Citations and quotations omitted, emphasis added.)

The foregoing explanation demonstrates that the "functional test" is a creature of case law, and is not expressly set forth in the statutory language of the FOIA exemption 5. As a result, the parameters of the "functional test" should be narrowly construed. *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d, 1082, 1085 (9th Cir. 1997); *see also County of Madison*, 641 F.2d at 1040, *citing Vaughn v. Rosen*, 484 F.2d at 823 and at n.11 ("[C]ourts have repeatedly stated that uncertainties in the FOIA's language are to be construed in favor of disclosure and that its exemptions are to be read narrowly."). In this regard, none of the cases in which the functional test was satisfied involved communications from "consultants" who had a direct and personal interest in the outcome of the agency decision for which their "advice" was given, and none of these consultants had

adversarial relationships with the involved agencies.[3] This case, in contrast, is replete with evidence that the Tribes are non-neutral, interested parties who believe that they will significantly benefit from favorable decisions by Interior agencies regarding Klamath Project operations. The Tribes, moreover, are past, present, and potential future adversaries of Interior with respect to the decisions being made in the KPOP and the adjudication. The court of appeals, therefore, did not err in narrowly construing the so-called "functional test."

The same "functional test" arguments advanced here by the United States were similarly rejected in *County of Madison*, 641 F.2d 1036, which is closely on point. In *County of Madison*, the court considered whether Department of Justice ("DOJ") settlement documents in an Indian claims case brought by the Oneida Indian Nation were exempt from disclosure under FOIA. The withheld

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[3] *See, e.g., Formaldehyde Institute*, 889 F.2d 1118 (review letter submitted by scholarly journal's review panel to Dept. of Health & Human Services); *Public Citizen, Inc. v. Dept. of Justice*, 111 F.3d 168, 177 (D.C. Cir. 1997) (communications between former President Bush and National Archives and Records Administration); *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) (report prepared by consultant retained by the Office of Federal Contract Compliance Programs); *Ryan v. Dept. of Justice*, 617 F.2d 781 (D.C. Cir. 1980) (non-factual portions of congressional responses to Justice Department questionnaires); *Wu v. National Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973) (report prepared by consultants retained by National Endowment for the Humanities); and *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (report prepared by panel of experts convened by Office of Science and Technology).



documents were correspondence between the Oneidas' attorneys and the DOJ regarding settlement of the Oneidas' Court of Claims case. Third parties, who were defendants in a similar district court suit brought by the Oneidas, sought disclosure of these settlement correspondence documents. *County of Madison* at 1038-1039.

There, the United States acknowledged that the withheld documents were " 'not literally inter- or intra-agency letters.' " *Id.* at 1039. Nonetheless, the United States argued, as it is now, that the court should rely on cases that protect communications from outside consultants called upon to assist in internal decision-making, as precedent for reading exemption 5 broadly enough to encompass the withheld documents. *Id.* at 1040. The First Circuit rejected this argument. The court could "perceive of no way . . . to describe the Oneidas' lawyers as 'intra-agency' – that is to say 'within the Department of Justice' – that does not simply omit the term 'intra-agency' from the Act in pursuit of policy ends." *Id.* The court explained as follows:

> [T]he Oneidas approached the government with their own interest in mind. While they came to parley, they were past and potential adversaries, not coopted colleagues. . . . [W]e believe that expanding exemption five to include self-seeking petitioners "within" agencies would do more violence to statutory language than Congress' direction permits.

*Id.* at 1040-1041.

The United States also argued in *County of Madison* that the documents were protected by exemption 5 due to

the " 'unique fiduciary relationship between the government and the Indians [which] . . . requires that communications between the two remain confidential so as to maintain 'the trust and confidence necessary to sustain the government's relationship with the Oneidas, and Indians in general.' " *Id.* at 1042 (citation omitted). The First Circuit properly rejected this argument, reasoning as follows:

> We might agree with the sense of this position. We confess to feeling a sense of indecent exposure in countenancing a third party adversary obtaining confidential exchanges between the Indians' attorneys and the government. *But we cannot agree that this means that Indians are "within" the Department of Justice.*

*Id.* (emphasis added).

In the instant case, the facts favoring disclosure are significantly more compelling and are in accord with the First Circuit's *County of Madison* decision. The Klamath Basin Tribes approached the government with their own interests in mind. They aggressively advocate government action – the reallocation of water – which they assert would benefit them, and which most surely would be injurious to agricultural communities. The Tribes pursue their ends with every available strategy. They make political overtures to the Office of the Secretary. ER 385. They threaten lawsuits. ER 276, 323, 324-332, 372-374, 378-380. They prepare technical reports to support their advocacy. ER 345-364, 372-374. They demand that irrigation diversions be shut off. ER 322-323, 380.

The district court in this case distinguished *County of Madison* because the Klamath Basin Tribes "are not in



current litigation with the government," and "[m]ost of the documents were provided to the government at their requests." Pet. App. 59a. The Tribes, however, expressly threatened to sue the Department of the Interior before, during, and after the KPOP process, and the period covered by the FOIA requests in issue. Those threats include threats in September of 1994, December of 1994, February and March of 1996, and September of 1996. ER 276, 322, 324-332, 378-380. Just as in *County of Madison*, therefore, the Klamath Basin Tribes were, and remain, potential adversaries to Interior. By ordering the disclosure of actual *settlement* communications, which should be the least subject to disclosure, *County of Madison* emphasized the importance of adhering to the plain language of the FOIA, and of construing the FOIA exemption 5 narrowly.

The United States also cites *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997) to support its arguments. Petition for Writ of Certiorari (Pet.) at 21-22. This continued reliance on the *Public Citizen* case is misplaced. In *Public Citizen*, a public interest group sued the National Archives and Records Administration ("Archives") seeking correspondence between the Archives and former Presidents Ronald Reagan and George Bush relating to access to their respective presidential records. *Id.* at 169. The Archives invoked the FOIA exemption 5 and the deliberative process privilege, arguing that because the communications took place as part of consultations required under the Presidential Records Act, 44 U.S.C. §§ 2201-2207 (1994), the records met the "functional test" rule for external consultant communications created for the purpose of aiding the agency's deliberative process. *Public Citizen* at 169. The plaintiff argued

that due to other aspects of the relationship between the President and the Archives, it cannot be consultative for the purposes of the FOIA exemption 5. In particular, plaintiffs argued that the former President "has a distinct and independent interest that makes him an adversary." *Id.* at 171. The plaintiff, however, offered no objective evidence of an adversarial relationship, and the circuit court explained as follows:

> At some point, of course, features of the other relationships (above all, a possible future adversary one) might come to eclipse the consultative relationship, but plaintiff has offered nothing concrete to suggest any movement in that direction here.

*Id.*

Lacking any concrete evidence of an adversarial relationship, the court found that "the potential for an adversary relationship is not enough to negate one of consultation." *Id.*

Here, in contrast, there is overwhelming evidence of the Tribes' biased, advocacy-based and often adversarial relationship with Interior, and these features have clearly eclipsed any neutral consultative relationship that may otherwise have existed. As a result, the *Public Citizen* case clearly undercuts the United States' argument that the Tribes stand in the role of consultants for the purposes of the FOIA exemption 5. The court of appeals, therefore, quite correctly found that the Klamath Basin Tribes' relationship with Interior and the Association regarding the water rights disputes in the Klamath River Basin preclude the possibility of any truly neutral consultative role that the Tribes may have in the United States' deliberations



pertaining to the KPOP and the state water rights adjudication processes.

The Association acknowledges the significant fiduciary and trust responsibilities that the United States owes to Tribes. However, there is nothing in the FOIA, the FOIA case law, or the FOIA's legislative history which broadly exempts the United States from complying with the FOIA when carrying out these duties. Likewise, of course, nothing exempts the United States from complying with the FOIA when the United States fulfills its significant obligations toward its Klamath Project contractors. In this regard, in response to the FOIA requests from the Klamath Basin Tribes, Interior has disclosed correspondence between the United States and the Association's members regarding the KPOP and the Klamath River Basin adjudication. ER 283, 365-371. This one-way street created by Interior indicates a failure to acknowledge Interior's dual obligations toward the Klamath Basin Tribes and its Klamath Project contractors.[4]

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[4] *See Nevada v. United States*, 463 U.S. 110, 128 (1983), *reh'g denied*, 464 U.S. 875 (1983), wherein this described the United States' dual obligations toward its Indian interests and its reclamation project contractors, aptly stating as follows:

> Today, . . . it may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other

In summary, the court of appeals correctly decided that, under the unique facts and circumstances of this case, the disputed documents "fail to meet the threshold inter-agency/intra-agency test," under the FOIA exemption 5. *See* Pet. App. 10a.

**B. There Is No Trustee-Beneficiary Privilege Recognized Within The Purview Of The FOIA Exemption 5.**

The United States' assertions are fatally flawed because they rest upon the faulty premise that some sort of trustee-beneficiary privilege exists within the purview of the FOIA exemption 5. The United States asserts that "under the court's ruling, the Tribes' communications to their representative (the United States) will be subject to compelled disclosure under FOIA, without regard to the applicability of any traditional discovery privilege." Pet. at 24. This statement suggests the existence of a recognized trustee-beneficiary privilege in the discovery context. No specific trustee-beneficiary privilege exists at common law,[5] however, and under the Federal Rules of

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interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

[5] There is, of course, the unrelated *fiduciary exception* to the attorney-client privilege, which bars trustees from invoking the attorney-client privilege to shield disclosures to beneficiaries.



Evidence Rule 501, federal courts have rarely expanded privileges beyond established privileged relationships such as attorney-client and husband-wife.[6] The courts, moreover, will construe established privileges narrowly, generally leaving Congress to decide whether to establish new privileges. *University of Pa. v. EEOC*, 493 U.S. 182, 186-187 (1990).

Article V of the Federal Rules of Evidence ("Rules") sets forth the statutory law of privileges in federal court. This article contains only one general rule stating that privileges shall be "governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed.

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*See, e.g., United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999), *citing Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709 (1976).

[6] *See, e.g., Trammel v. United States*, 445 U.S. 40, 53 (1980) (narrowing husband-wife privilege and holding that witness spouse may testify over the objections of the other spouse); *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (declining to recognize a privilege for academic peer review proceedings); *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-819 (1984) (rejecting an accountant work-product privilege); *United States v. Gillock*, 445 U.S. 360, 367-368 (1980) (refusing to recognize a privilege for state legislators in federal court); *United States v. Nixon*, 418 U.S. 683, 709 (1974) (rejecting a privilege for confidential communications between the President and the President's high-level advisors); *Couch v. United States*, 409 U.S. 322, 335 (1973) (rejecting an accountant-client testimonial privilege); *United States v. Schoenheinz*, 548 F.2d 1389, 1390 (9th Cir. 1977) (declining to recognize an employer-stenographer privilege); *In re Grand Jury Impaneled on January 21, 1975*, 541 F.2d 373, 382 (3d Cir. 1976) (declining to recognize a required-reports privilege); *In Re Erato*, 2 F.3d 11 (2d Cir. 1993) (declining to recognize parent-child privilege to bar testimony).

R. Evid. 501. The Rules, as originally proposed, included nine specifically defined privileges, and a provision that the federal courts would allow no other privileges except by an Act of Congress. House Comm. of Judiciary, Fed. Rules of Evidence, H.R. Rep. No. 650, 93d Cong., 1st Sess. at 8 (1973); 1974 U.S.C.C.A.N. 7075, 7082. Those nine enumerated privileges were as follows: required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer. *Id.* Eventually Congress deleted the specific privileges from the draft Rules in favor of the more general rule. This was done in part to defer to state privilege law in diversity cases. *Id. See also* Fed. R. Evid. 501 (" . . . [I]n civil actions and proceedings . . . to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.")

The proposed Rules serve as a useful guide in determining the existence and scope of federal law on evidentiary privileges. *See In re Grand Jury Investigation*, 918 F.2d 374, 380 (3d Cir. 1990). A trustee-beneficiary privilege was not included in the nine enumerated privileges. The proposed Rules, moreover, stated that no other privileges should apply unless created by Congress. H.R. Rep. No. 650, 93d Cong., 1st Sess. at 8; 1974 U.S.C.C.A.N. 7075, 7082. The absence of a trustee-beneficiary privilege in the proposed Rules, and the overarching policy disfavoring the creation of new privileges strongly weigh against establishing a trustee-beneficiary privilege in this case, which is essentially what the United States has requested this Court to do.



Since the enactment of Rule 501, this Court has generally declined to expand a privilege unless it is statutorily created, or within established common law. In *University of Pa. v. EEOC*, 493 U.S. 182, a university refused to disclose several tenure-file documents requested by the Equal Employment Opportunity Commission, even after the Commission issued a subpoena. *Id.* at 189. The Commission needed the documents to determine the merits of a sexual discrimination charge. The university argued that a qualified privilege for confidential peer-reviewed material should apply for policy reasons and First Amendment principles of academic freedom. *Id.* at 186-187. This Court refused to create and apply an evidentiary privilege in that case. This Court reasoned that to adopt a new privilege, a sufficiently important interest in nondisclosure must outweigh the need for the probative evidence. *Id.* at 189, *citing Trammel v. United States*, 445 U.S. 40, 51 (1980). This Court reiterated its long-standing view that the policy favoring open discovery requires courts to strictly construe privileges. *University of Pa.*, 493 U.S. 189. "[A]lthough Rule 501 manifests a congressional desire 'not to freeze the law of privilege' but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis . . . we are disinclined to exercise this authority expansively." *Id.* (citations omitted).

This Court has extended privileges in certain limited circumstances under the flexibility provision of Rule 501, but relied on historic precedent in doing so. The Court has held that grand and petit jury proceedings were privileged based on 17th century law incorporated into federal law and codified in the Federal Rules of Civil

Procedure. *University of Pa.*, 493 U.S. at 195, *citing Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979) and *Clark v. United States*, 289 U.S. 1, 13 (1933). Based upon constitutional foundations, the Court granted a qualified privilege for certain presidential communications in *United States v. Nixon*, 418 U.S. 683 (1973). Lastly, the Court extended the psychotherapist-patient privilege to include a patient's communications with a social worker. *Jaffee v. Redmond*, 518 U.S. 1 (1996). Like the other limited exceptions, historic and state statutory authority supported the decision in *Jaffe*, given that all 50 states had enacted some form of that privilege. *Id.* at 12. Moreover, the privilege was included in the original enumerated federal rules submitted by the Advisory Committee. *Id.* at 14. This provided sufficient "reason" and "experience" to extend the privilege. *Id.* at 13.

In contrast to the *Jaffe* case, where courts are unable to find the necessary historical or statutory basis to adopt expanded privileges, they typically decline to do so. In *In re Grand Jury*, 103 F.3d 1140, 1150 (3d Cir. 1997), the court acknowledged that it had the authority to recognize a new parent-child privilege, but thought this recognition should best come from Congress. *Id.* at 1157. The parent has a fiduciary duty to the child; however, unlike the therapist-patient relationship, it lacked the historical antecedents to judicially establish a privilege. *Id.* at 1152. In addition, the majority of state courts had rejected the idea. *Id.* at 1151. This proposed parent-child privilege, moreover, was not in the original proposed Rules. *Id.*

In the instant case, the United States has essentially proposed the creation of a trustee-beneficiary privilege to include communications between tribes and government



agencies. (Of course, the United States never raised this issue below in precisely this context.) This proposed privilege, however, is without precedent or foundation. A trustee-beneficiary privilege (or more specifically, a government-tribal privilege) is not mentioned in the proposed Rules, nor extended in any case law, either federal or state. The need for this privilege, moreover, lacks the kind of "transcendent importance" necessary to outweigh the policy favoring discovery. In any event, the scope of such a privilege would be difficult to define and unwieldy in light of all the other responsibilities of the government.

Based on the foregoing, this Court should deny the United States' apparent attempt to create a newly recognized trustee-beneficiary privilege.

## CONCLUSION

The United States' alarmist assertions regarding the far-reaching effects of the court of appeals decision are without any real merit. Under any circumstances, the United States is always free to request Congress to create a whole new exemption under the FOIA to protect non-neutral, advocacy-based correspondence between tribal interests and Interior agencies.

Based upon the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: July 21, 2000.

Respectfully submitted,

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## APPENDIX A

## INDEX TO DOCUMENTS REMAINING IN DISPUTE

| DOCUMENT NUMBER | DATE | FROM | TO | DEFENDANTS' VAUGHN INDEX DESCRIPTION |
|---|---|---|---|---|
| 3/96-168 (7 pages) | 1/19/96 | Klamath Tribes Department of Natural Resources | Cathy Wilson (BIA); also sent to Office of the Solicitor, Division of Indian Affairs | Seven page position paper discussing legal theories concerning the water rights of the federally recognized Indian tribes of the Klamath Basin. **(ER 132-133.)** |
| 6/96-168 (1 page) | 1/24/96 | Cathy Wilson (BIA) | Tom Strekal (BIA), Doug Tedrick (BIA), Richard Cross (atty. for Yurok Tribe), and Bud Ullman (atty. for Klamath Tribes) | One page memorandum which contains views on policy the BIA could provide to other governmental agencies concerning the obligation to protect Indian trust assets in developing an operations plan for the Klamath Project. Specifically, the memorandum considers proposing language as guidance regarding the trust responsibility. **(ER 133-134.)** |
| 10/96-168 (5 pages) | 2/8/96 | Bud Ullman (atty. for Klamath Tribes) | Tom Strekal (BIA) | Five page position paper with fax transmittal sheet. On 12/3/96, the Dept. released the fax transmittal sheet accompanying this documents. The paper expresses views concerning trust resources in light of the Fish and Wildlife Service's proposal regarding listed species and the resulting implications on lake mgmt. **(ER 134-135.)** |
| 16/96-201 (3 pages) | 5/23/96 | Bud Ullman (atty. for Klamath Tribes) | Lynn Peterson (Regional Solicitor) | Three page letter discussing the Klamath Basin Adjudication. This letter concerns the water rights claims being prepared on behalf of the Klamath Tribes. **(ER 140.)** |
| 20/96-201 (1 page) | 6/18/96 | Jeff Mitchell (Klamath Tribes) | Stan Speaks (BIA) | One page letter with attachment. Letter references the attachment and highlights the issues therein. Attachment is the three page 5/23/96 letter from Bud Ullman to Lynn Peterson discussing the Klamath Basin Adjudication (identified by FOIA document number 16/96-201). See analysis above regarding the rationale for withholding the attachment. **(ER 142.)** |
| 25/96-201 (3 pages) | 6/28/96 | Bud Ullman (atty. for Klamath Tribes) | Stan Speaks (BIA) | One page letter with two page attachment. Letter references the attachment and highlights the issues therein. Attachment is the Klamath Tribes' resolution regarding the Tribes' water right claims in the Klamath Basin Adjudication. **(ER 142-143.)** |
| 27/96-201 (11 pages) | 7/1/96 | Jacob Kahn (Klamath Tribes) | Cathy Wilson (BIA) | Two page memorandum, nine pages of graphs, an 1 a fax transmittal sheet. The memo concerns biological factors affecting trust resources. On 12/27/96, the Dept. released the fax transmittal sheet accompanying this document. **(ER 144.)** |

Supreme Court, U.S.
FILED
AUG 14 2000

No. 99-1871

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

*v.*

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

A. As the petition for a writ of certiorari explains (at 3-6), the courts of appeals have repeatedly held that documents prepared outside the government—*e.g.*, by consultants retained by an agency to advise and assist it in performing official functions—may be treated as "intra-agency memorandums or letters" within the meaning of FOIA Exemption 5, 5 U.S.C. 552(b)(5). Respondent contends that the documents submitted by the Klamath Tribes to the Bureau of Indian Affairs (BIA) concerning the water rights the United States holds in trust for the Tribes cannot qualify for protection under Exemption 5 because the Tribes are "non-neutral, interested parties who believe that they will significantly benefit from favorable decisions * * * regarding Klamath Project operations." Br. in Opp. 12. Respondent further argues that the Tribes for whom the United States holds property in trust cannot be accorded the same status as agency consultants for

these purposes because the Tribes have an adversarial relationship with the government. See *id.* at 8, 11-12, 14-15, 16. Those claims lack merit as a legal matter. Furthermore, as we explain in the petition (at 6-11, 14-18, 26-28), the court of appeals' decision, if allowed to stand, will cause substantial disruption of the relationship between the United States and Indian Tribes. It also undermines the performance of the United States' historic trust responsibility with respect to land and water rights that the United States holds in trust for Indians and that are critical to the economy and way of life of reservation communities.

1. Situations may arise in which a private party's independent stake in a matter creates a divergence of interests between himself and the government that negates the possibility of a viable consultancy or similar relationship to which Exemption 5 may extend. There is no basis for concluding, however, that an Indian Tribe's interest in resources held in trust by the United States has that effect. The government in its administration of Indian trust property acts in a fiduciary capacity, and the duty not to disclose confidential information acquired from the beneficiary is a traditional feature of the fiduciary's role. See Pet. 14-16. Far from precluding the formation of a proper consultancy relationship, the Tribes' interest in the subject property makes it essential that the Tribes be consulted and that their expectation of confidentiality be respected.[1]

[1] Although an agency's relationship with an outside consultant is typically formed on an ad hoc basis at the discretion of the agency, the Bureau of Indian Affairs' relationship with Indian Tribes concerning trust property is enduring and arises by operation of law. Confidential treatment of tribal submissions relating to trust resources recognizes the Tribe's enduring interest in the integrity of that relationship, in addition to the governmental interest in receiving candid advice that generally underlies (see Pet. 4-6) the application of Exemption 5 to documents submitted by an outside consultant. For that reason it was especially inappropriate for the court of appeals to afford communications with Indian Tribes concerning their trust property a dignity less than that of communications with ordinary consultants, based on the court's view of a factor—the Tribes' interest in their trust resources—that is the very foundation for the relationship and the very reason why the BIA solicits the Tribes' advice and assistance.



Respondent contends that the government's position "would essentially broaden the FOIA's exemption 5 to include virtually any communications between interested beneficiaries in federal programs and the federal agencies which oversee such programs." Br. in Opp. 9. That is not so. This Court has long recognized that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). In its role *as trustee* for tribal natural resources, the United States is subject to a duty of loyalty separate and distinct from (though not inconsistent with) the general obligation of the Executive Branch to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. To say that the government's role as trustee entails a duty of confidentiality does not suggest that communications from all persons claiming a legal right to favorable treatment from the government are exempt from disclosure under the FOIA.

Thus, the decision of the Bureau of Indian Affairs to withhold the seven documents at issue in this case does not reflect "a failure to acknowledge Interior's dual obligations toward the Klamath Basin Tribes and its Klamath Project contractors." Br. in Opp. 17. We agree that the Department of the Interior (DOI) (like the federal government generally) has legal obligations

both to the Tribes and to respondent's members. We do not agree, however, with the suggestion that those obligations can be equated. The United States' special duty of loyalty and confidentiality in its role as trustee for tribal property rights has no analogue in the government's relationship to other private parties, and that duty has direct implications for the proper application of the FOIA.

2. Respondent contends that the Tribes are inappropriate consultants because they "are past, present, and potential future adversaries of [the Department of the] Interior with respect to the decisions being made in the KPOP and the adjudication." Br. in Opp. 12; see *id.* at 8, 11-12, 14-15, 16. That characterization rests on tribal officials' occasional references to the possibility of lawsuits against the DOI regarding its allocation of Klamath Project water. See *id.* at 15. In any consultative relationship, however, there exists a *possibility* of future litigation between the parties. That certainly is the case with respect to consultations between the Archivist and former Presidents concerning the confidentiality of Presidential records, which were at issue in *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997).[2] Yet the District of Columbia Circuit sustained the application of Exemption 5 to those communications, observing that "[d]octors, lawyers and other expert advisors may find themselves in litigation as either plaintiffs or defendants against those whom they advise (e.g., breach of contract and malpractice claims), but for all that they are still consultants." *Public Citizen*, 111 F.3d at 171. Neither the possibility

[2] See *Nixon* v. *United States*, 978 F.2d 1269, 1270-1275 (D.C. Cir. 1992) (recounting history of litigation between the United States and former President Nixon regarding public use of the former President's records).



of litigation between the Tribes and the United States, nor tribal officials' occasional allusions to that possibility, negate the consultative relationship that otherwise exists between the Tribes and the government in its role as trustee. See *ibid.* (observing that "there is often a *possibility* of litigation between entities within the executive branch, yet no one has suggested that courts should on this account refuse to apply Exemption 5 to their inter-agency communications") (citation omitted).[3]

The court in *Public Citizen* noted the possibility that an adversary relationship between parties previously engaged in consultation "might come to eclipse the consultative relationship." 111 F.3d at 171. But nothing of that sort has happened here. The fact that the Tribes have disagreed with some aspects of DOI policy does not undermine the essential consultative relationship. Those who are called upon to consult with an agency about the agency's official responsibilities may express divergent views (just as agency employees themselves may do), and the "give-and-take of the consultative process," *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980), ensures that an agency policymaker can benefit from a range of perspectives before reaching a decision. Respondent does not contend that the Tribes have actually initiated litigation against any federal agency concerning the allocation of water within the Klamath

[3] That is particularly so in light of the fact (see Pet. 11; Pet. App. 41a-49a) that six of the seven documents at issue here were submitted to or created by the BIA, the agency most specifically "charged with fulfilling the trust obligations of the United States" to the Indians. *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968); see also *Nevada* v. *United States*, 463 U.S. 110, 127, 135-138 n.15 (1983). The record materials on which respondent relies (see Br. in Opp. 15) refer to the possibility of litigation against the Bureau of Reclamation.

Basin, much less provide any basis for concluding that the relationship between the government as trustee and the tribal beneficiaries has become *predominantly* adversarial.

There is, in particular, no basis for regarding the Tribes and the government as "adversaries" with respect to the seven documents at issue here. The district court found that "[a]ll the documents played a role in the agency's deliberations" and that "[m]ost of the documents were provided to the agency by the Tribes at the agency's request." Pet. App. 59a. As the dissenting judge in the court of appeals recognized, "these communications spring from a relationship that remains consultative rather than adversarial, a relationship in which the Bureau and Department were seeking the expertise of the Tribes, rather than opposing them." *Id.* at 25a-26a (Hawkins, J., dissenting).[4]

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[4] As the petition explains (at 7), DOI's Departmental Manual states that agency policy is "to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety." C.A. E.R. 254. That policy statement makes clear that the tribal submissions in this case were not foisted on an unreceptive agency; rather, they were solicited by the DOI in order to assist the agency in its performance of trust responsibilities.

As respondent points out (Br. in Opp. 8), Executive Branch policy statements issued in November 1993 and April 1994 state that consultations between federal and tribal officials "are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals." C.A. E.R. 250; see *id.* at 252. The obvious import of those statements, and the way in which they are interpreted and applied by the DOI, is that federal and tribal officials (the "interested parties" to the consultations) are to deal *with each other* in an "open and candid" manner—not that the consultations are to be "open" to the public or that the substance of the communications between the federal government and the Tribes is to be routinely released to the



3. Respondent virtually ignores the fact that four of the seven documents at issue in this case pertain to the federal government's representation of tribal interests in adjudicative proceedings conducted by the State of Oregon. See Pet. 9-10, 22-24. As the petition explains (at 22-24), the federal government in those proceedings does not act as a decisionmaker, but instead asserts claims on behalf of the Tribes (and on its own behalf) for ultimate resolution by state officials. In representing the Tribes in the Oregon proceedings, the United States is fulfilling a responsibility that has historically been an integral part of the government's role as trustee. See Pet. 23.

Particularly in the context of the Oregon proceedings, it is farfetched to contend that the Tribes' "direct and personal interest" (Br. in Opp. 11) in the allocation of Klamath Basin water renders the Tribes an inappropriate consultant. Nor is there any basis for viewing the relationship between the Tribes and the federal government as adversarial. To the contrary, there is in this context an inherent community of interests between the Tribes and the United States, and the Tribes are a natural source of expertise for the federal officials charged with protecting the Tribes' interests. Tellingly, respondent (like the court of appeals) makes no effort to explain how its theory of the case applies to

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public. Indeed, the Departmental Manual clarifies that information received by the DOI through consultation with tribal representatives "shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s)." *Id.* at 255; see Pet. 8.

the documents submitted to the agency in connection with the state adjudication.[5]

B. Respondent argues (Br. in Opp. 18-23) that the government's position depends upon the existence of a "trustee-beneficiary privilege" in the civil discovery context. That argument misapprehends the government's theory. FOIA Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Thus, if particular documents qualify as "intra-agency memorandums," those documents are covered by Exemption 5 if, but only if, they are "not available by law * * * in litigation"—*i.e.*, are privileged from disclosure in discovery. See Pet. 3; *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *FTC* v. *Grolier Inc.*, 462 U.S. 19, 26 (1983); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

The magistrate judge found that all seven documents at issue in this case are covered by the deliberative-process privilege, Pet. App. 56a-61a, and that two of the documents (involving the Oregon adjudication) are

[5] As the petition explains (at 27 n.6), respondent's reliance (see Br. in Opp. 12-15) on *County of Madison* v. *United States Department of Justice*, 641 F.2d 1036, 1039-1041 (1st Cir. 1981), is misplaced. The documents at issue in that case were submitted to the Department of Justice within the context of ongoing litigation between an Indian Tribe and the federal government. *Id.* at 1038. Here, by contrast, there is no litigation between the United States and the Tribes. See pp. 4-7, *supra*. The contrast between the two cases is particularly clear with respect to the documents relating to the Oregon adjudication, where the Tribes and the United States are in effect co-parties with an obvious community of interests. See also Pet. 23-24 (explaining that exchanges of information between parties with a common interest in litigation have traditionally been treated as privileged).



covered by the attorney-work-product privilege as well, see *id.* at 61a-65a. The district court adopted the findings and recommendation of the magistrate judge. *Id.* at 31a-32a. The government has never asserted a "trustee-beneficiary privilege" as a basis for finding that the documents satisfy the *second* requirement of Exemption 5—*i.e.*, that they are "not available by law * * * in litigation." Rather, under the "functional test" consistently employed by the courts of appeals, the determination whether particular records are "intra-agency memorandums or letters" (and therefore satisfy the *first* requirement of Exemption 5) depends on whether the private party who submits them is appropriately treated as a confidential consultant.[6] The trustee's well-established duty not to disclose information acquired in administering a trust where disclo-

[6] The petition states (at 24) that "[u]nder the [court of appeals'] ruling, the Tribes' communications to their representative (the United States) will be subject to compelled disclosure under the FOIA, without regard to the applicability of any traditional discovery privilege." Contrary to respondent's contention (Br. in Opp. 18), that statement does not "suggest[] the existence of a recognized trustee-beneficiary privilege in the discovery context." Rather, our point is that the court of appeals' unduly narrow construction of the term "intra-agency" has the practical effect of requiring the agency to release documents that in civil litigation would be covered by the deliberative-process and/or attorney-work-product privilege. That result would disrupt the government's performance of its trust responsibilities, and it would facilitate efforts to employ the FOIA "to supplement civil discovery," in derogation of congressional intent. *Weber Aircraft*, 465 U.S. at 801; see also *id.* at 801-802 ("We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented."). The court of appeals' decision also disadvantages the government and the Tribes vis-à-vis other parties to the Oregon adjudication (including respondent), who may continue to assert all available privileges. See Pet. 24.

sure would disserve the beneficiary's interests bears directly on that question. See Pet. 20-21.

C. Respondent errs in contending (Br. in Opp. 7) that the court of appeals' decision is "based upon the unique and limited factual circumstances of this case." Under the court of appeals' "direct interest" test, documents submitted by Tribes or individual Indians to assist federal officials in their performance of trust responsibilities can *never* be withheld under Exemption 5, since the trustee's administration of a trust corpus is always (by definition) a matter in which the beneficiary has a direct interest. As the petition explains (at 27), well over half of the lands held by the United States in trust for Tribes and individual Indians lie within the Ninth Circuit. The amicus briefs filed in this Court on behalf of numerous Tribes make clear that the question presented here recurs frequently, and that the court of appeals' decision can be expected substantially to disrupt the interactions between federal and tribal officials that facilitate the United States' performance of its trust responsibilities. See, *e.g.*, Brief Amici Curiae of the Ute Indian Tribe 17-20; Brief Amici Curiae of the National Congress of American Indians 5-7; Brief Amici Curiae of the Eastern Shoshone Tribe of the Wind River Reservation 4-6.

* * * * *

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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AUGUST 2000

(2)

No. 99-1871

Supreme Court, U.S.
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CLERK

In The

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

*Petitioners,*

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF *AMICI CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE CHIPPEWA CREE TRIBE OF THE ROCKY BOYS' RESERVATION, THE KLAMATH TRIBES, THE TULE RIVER TRIBE, THE NEZ PERCE TRIBE, ET AL. IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*[1]

The Klamath Tribes, working closely with their federal trustee to protect their water resources, exchanged documents with the United States Department of the Interior about these trust resources. Notwithstanding the trust nature of the communications, the United States Court of Appeals for the Ninth Circuit held that these documents were subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (1994) [hereinafter FOIA].

*Amici Curiae* are seventy-five federally recognized Indian tribes, one Indian water rights coalition, one intertribal council, and one national Indian organization. All *amici* tribes have trust resources and routinely find themselves in the same position as the Klamath Tribes. *Amici* tribes are not in sole possession of their trust resources; title is held by the United States in a trusteeship that has been defined by over 150 years of this Court's unique jurisprudence regarding federal-tribal relations. *Amici* tribes must give information to their trustee to ensure their rights and have a longstanding and substantial interest in having these communications remain confidential. Under the Court of Appeals' opinion, however, if tribes share crucial information with the United States, that information is subject to disclosure under FOIA, no matter how confidential. *Amici* thus have a substantial interest in having the United States Supreme Court review and reverse this potentially devastating decision.

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[1] Counsel for Petitioners and Counsel for Respondents have consented to the filing of the brief of *amici*. The consents are submitted for filing herewith.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals held that the United States must, under FOIA, disclose sensitive documents exchanged between the federal government and the Klamath Tribes regarding tribal trust resources – in this case, federally reserved tribal water rights. The documents at issue were created to aid in the government's filing of water rights claims on behalf of the Tribes in a state water rights adjudication and to aid in the government's preparation of a long-term water management plan for the Klamath River Basin.

*Amici* argue herein that under principles articulated by this Court, FOIA does not apply to the federal-Indian trust relationship at issue. Alternatively, the communications here fit within Exemption 5 of FOIA, which states that "[t]his section does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency. . . . " 5 U.S.C. § 552(b)(5).

Traditionally, courts have applied what has been coined the "functional test" for determining whether Exemption 5 protects from disclosure documents created by outside consultants. *See Texas v. Interstate Commerce Comm'n*, 889 F.2d 59, 61 (5th Cir. 1989), (*citing Hoover v. United States Dep't of Interior*, 611 F.2d 1132 (5th Cir. 1980). Under this test, courts analyze the nature of the communications at issue to determine the role they play in agency determinations. Where the communications play a consultive role, or aid in an agency's deliberations, they are protected from disclosure under Exemption 5, even where the entity creating the documents is not a government



agency. *See Public Citizen, Inc. v. Dept. of Justice*, 111 F.3d 168, 170 (D.C. Cir. 1997) (exempting communications of former president); *Wu v. Nat'l Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972) (exempting communications of professors of Chinese history); *Formaldehyde Inst. v. Dept. of Health and Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989) (exempting letter by review panel for scholarly journal); *Hoover v. United States Dept. of Interior*, 611 F.2d 1132 (5th Cir. 1980) (exempting appraisers report); *Ryan v. Dept. of Justice*, 617 F.2d 781 (D.C. Cir. 1980) (exempting communications by United States Senators).

The Court of Appeals went beyond existing FOIA law to create a new test to determine that the documents here were not exempt under Exemption 5. Rather than looking to the role the documents played in agency deliberations pursuant to the trust relationship, the Court of Appeals held that the Tribes' *interest* in the subject matter of the communications mandated disclosure. On this point, the court noted that "the Tribes with whom the Department has a consulting relationship have a direct interest in the subject matter of the consultations." *See* Petition at App. 8a. Based on this reasoning, the court held that the documents at issue must be disclosed under FOIA.

The Court of Appeals' holding that such communications are subject to disclosure under FOIA will have a broad and damaging impact on the federal trust relationship and on tribes nationwide.[2] As all tribes have a

[2] As the United States' Petition points out, the Ninth Circuit's opinion directly impacts 400 of the 556 federally

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"direct interest" in their tribal resources, the court below has essentially created a rule of universal application to Indian tribes. Such a rule will put tribes to a Hobson's choice: either they must cease full communication with their trustee about their trust resources, thereby forcing the United States to carry out its trust blindly, without the experience, expertise, and goals of the tribes – or they must run the risk that all such communications will be subject to public disclosure on demand, even where such disclosure would be damaging to the tribe, would amount to a breach of the United States' trust duty, and would otherwise be protected from discovery in litigation.

*Amici* urge this Court to grant the United States' Petition for a Writ of *Certiorari* because of the extreme importance of this case to Indian tribes and their trust resources. The decision allowing FOIA to work a sea of change in the historic relationship between the United States and tribes should come from no less an authority than this Court – the institution that has been supremely influential in defining the federal-tribal relationship. Given the magnitude of the decision's impact, coupled with the Court's central, critical role in developing the unique jurisprudence of the United States' relationship with Indian tribes, *Amici* urge this Court to grant the United States' Petition for a Writ of *Certiorari*.

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recognized tribes and 28 million out of 45.5 million acres of trust land. Petition at 27. Additionally, though not directly impacting tribes and land in other circuits, the opinion will have a chilling effect on shared communications between those tribes and the United States due to the uncertainty cast by the Ninth Circuit's opinion that those communications will remain confidential.



## ARGUMENT

### I. THIS CASE MERITS REVIEW BY THIS COURT BECAUSE OF ITS IMPORTANCE

#### A. The Impact Of The Court Of Appeals' Decision Will Be Widespread And Potentially Disastrous For Tribes

All tribes rely on the United States in its fiduciary capacity with respect to tribal resources. Tribes are not in sole possession and control of their trust resources because the United States holds the legal title to those resources, as in the instant case. Thus, to protect their resources – especially those coveted by third parties – tribes must work with the United States.[3]

In some instances, tribes rely on the United States to bring suit on their behalf, to respond to suits brought by others, or to represent their interests in settlement negotiations or administrative proceedings involving those

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[3] As the Eleventh Amendment precludes tribes from suing states absent waiver of sovereign immunity by the state, often tribes have no choice but to depend on the United States to assert tribal interests where a state is involved. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (noting that although Congress may not use its powers under the Commerce Clause to abrogate state sovereign immunity to suit by tribes, the United States may bring suit against state). *See also, Arizona v. San Carlos Apache Tribe*, 463 U.S. 546, 565 (1983) (United States argued that it was "unfair to force Indian claimants to choose between waiving their sovereign immunity by intervening in state proceedings and relying on the United States to represent their interests in state court.")

resources. The area of water rights alone provides a powerful example. Nearly fifty tribes and pueblos are currently in litigation or negotiation to establish or implement tribal water rights. In each of these cases, the United States is participating in its capacity as fiduciary. At present, the United States has assigned thirty-six federal negotiating teams to work directly with tribes in settling issues of tribal water rights, and each year the United States dedicates tens of millions of dollars towards pursuing water rights claims for tribes. *See Working Group on Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9223 (1990).

Resolution of water rights issues involves years of cooperative work between tribes and the United States. For instance, the Klamath Tribes themselves have been working with the United States regarding their water rights since at least 1987, and certain Pueblos since the 1970's. These tribes have already shared information with their fiduciary with the understanding that such information, including information about case strengths and weaknesses, would be confidential. Many tribes, like the Klamath Tribes, have entered into memoranda of understanding with the United States regarding the sharing of data relevant to those proceedings, including work performed by the tribes to aid the United States in fulfilling its trust responsibilities. Under the Court of Appeals' decision, however, shared information, no matter how damaging to the protection of the tribes' resources, is subject to disclosure. It is even subject to disclosure to adversaries in litigation, as is the case here.



Allowing such disclosure of private tribal information is deeply destructive of the federal trust because tribes will be put to an unfair choice between sharing vital information with their trustee about trust resources, or withholding that information and severely undermining the ability of the United States to act as fiduciary. Moreover, allowing this disclosure sharply tilts litigation and settlement negotiations in favor of non-Indians competing with tribes for limited resources. While the public is granted access to confidential tribal-federal communications, tribes have no corresponding access to confidential information shared by opposing parties with their representatives and attorneys.

Further, by hamstringing a tribe's ability to confidentially communicate with its trustee, the decision below will affect the willingness and ability of tribes and the federal government to participate in water adjudications and settlement negotiations. This decision will increase the time and cost of both negotiation and litigation by requiring the United States to duplicate any investigation of tribal water rights claims that might be sensitive, even though years and hundreds of thousands of dollars may have already been spent by the tribe to collect the information. This result will harm not only tribes but all interests seeking to resolve water rights – including states and local water users.

### B. The Court Of Appeals' Decision Undermines The Trust Relationship Between Tribes And The United States That Has Been Developed And Confirmed By This Court

The federal Indian trust relationship is a cornerstone of federal Indian law and is a unique relationship that has

long been recognized by this Court, Congress, and the Executive Branch. *See United States v. Kagama*, 118 U.S. 375, 384 (1886); *Nat'l Farmers Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). The foundation of this trust relationship traces to the first cessions of land by tribes to the federal government and the mutual promises guaranteed through treaties accomplishing those cessions. In exchange for the tribes' relinquishment of vast tracts of land, the United States "undertook the obligation to insure the survival of tribes" on remaining tribal homelands or reservations. *See* American Indian Policy Review Comm'n, 94th Cong., Final Report 126 (Comm. Print 1977) [hereinafter *Comm'n Final Report*].

The trust relationship continued to evolve through judicial opinion of this Court. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that tribes are "domestic dependent nations [that exist] . . . in a state of pupilage" and that their relationship with the United States "resembles that of a ward to his guardian."); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832) ("[t]his relation [between the Cherokee Nation and the United States] was that of a nation claiming and receiving the protection of one more powerful"); *United States v. Kagama*, 118 U.S. 375, 384 (1886) (stating that "from their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection. . . . ").

The Court has steadfastly recognized and reinforced the trust relationship between the United States and Indian tribes, particularly where trust resources, such as those at issue here, are involved. As this Court has clearly



held, where the United States takes comprehensive control over Indian trust property, the United States must act as trustee to that property.[4] *United States v. Mitchell*, 463 U.S. 206 (1983) [hereinafter *Mitchell II*]. As this Court stated in *Mitchell II*:

> [A] fiduciary relationship necessarily arises when the government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber lands and funds). "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."

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[4] As a result of the General Allotment Act of 1887, codified as amended at 25 U.S.C. §§ 331-358 (1994), the United States became trustee over an enormous range of Indian resources. An equally broad range of statutes and regulations has given the federal government comprehensive control over Indian assets and activities related to them – oil and gas, minerals development, sale of timber and forest management, grazing and farming, as well as the proceeds generated from such resources which it must collect, manage, invest, and disburse to the beneficial owners of the land. *See, e.g., Cobell v. Babbitt*, 91 F. Supp.2d 1, 24 (D.D.C. 1999). The United States is also trustee over tribal water resources. *See Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (Cl. Ct. 1991) (holding that the United States was required under its trust responsibility to defend tribes' water rights).

*Mitchell II* at 225, *quoting Navajo Tribe v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980) (footnote omitted). The requisite level of federal control is plainly present in this case because the trusteeship causes the United States to represent the Klamath Tribes' water rights in the Klamath Basin Adjudication *whether the Tribes agree to that representation or not. See, e.g. Arizona v. San Carlos Apache Tribe*, 463 U.S. 546, 565 n.17 (1983) (observing that "any judgment against the United States, as trustee for the Indians, would ordinarily be binding on the Indians."); *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986) (despite tribal opposition, the United States was required by trusteeship to represent tribal water rights in state adjudication).

Under the trust relationship, the United States "has charged itself with moral obligations of the highest responsibility and trust" to protect tribal lands, assets, resources, and treaty rights. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The standard to which the United States is held in carrying out its fiduciary duties is informed by traditional trust law doctrine. *United States v. Mason*, 412 U.S. 391, 398 (1973) (*citing* 2A Scott, Trusts 1408 (3d ed. 1967) and stating that the United States has a duty "to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property"); *see also Comm'n Final Report* at 128 (stating that the federal government "must act with good faith and utter loyalty to the best interests of the beneficiary"). In this case, the pertinent principle of trust law is that a trustee is required to maintain the confidentiality of the information gained pursuant to the trust relationship when disclosure would be detrimental to the interest of the



beneficiary. Restatement (Second) of Trusts § 170 cmt. s (1959).

Despite this long and strong legal foundation, the Court of Appeals' decision allows the disclosure of sensitive communications from and to the Klamath Tribes regarding their trust resources in legal and administrative proceedings which affect those resources. In so doing, the lower court undermines the trust relationship and hence the entire body of law upon which this Court has founded federal-Indian relations. Because this case goes to the very heart of the United States' relationship with Indian tribes, whether such an outcome should stand – and it should not – is a question that requires this Court's review.

## II. THE COURT OF APPEALS ERRED BY IGNORING THE UNIQUE FEDERAL-TRIBAL TRUST RELATIONSHIP IN DETERMINING WHETHER THE DOCUMENTS AT ISSUE ARE SUBJECT TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

In reaching its decision, the Court of Appeals gave no weight to the uniqueness and content of the trust relationship between the United States and Indian tribes. The court analyzed the case as though the Klamath Tribes were not the subject of a federal trusteeship but, instead, were just like any other party submitting documents to a government agency. But tribes are not like other parties. Rather, "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). These distinctions must be considered to

determine whether FOIA applies to the communications at issue. By taking the trust relationship into account, it is clear that the documents are not subject to disclosure under FOIA.

### A. The Freedom Of Information Act Does Not Apply Where Confidential Documents Are Exchanged Between Indian Tribes And The United States About Tribal Trust Resources

It is a well-established principle of statutory construction that courts must presume that Congress does not intend to abrogate Indian rights when it passes general laws unless it specifically considers those rights. *United States v. Dion*, 476 U.S. 734 (1986). As this Court held in *Dion*:

> We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. *Cohen* 223; *see also United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941). "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . . " *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690, 99 S.Ct. 3055, 3077, 61 L.Ed.2d 823 (1979). We do not construe statutes as abrogating treaty rights in "a backhanded way," *Menominee Tribe v. United States*, 391 U.S., at 412, 88 S.Ct., at 1711; in the absence of explicit statement, " 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' " *Id.*, at 413, 88 S.Ct., at 1711, *quoting Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934). Indian treaty rights are too fundamental to be easily cast aside.



*Dion*, 476 U.S. at 738-739 (footnote omitted). The rule articulated by this Court in *Dion* is that in order to find that a statute of general applicability abrogates a tribal right, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740. Indeed, as the Ninth Circuit itself previously has held, when interpreting statutes, courts must "presume[ ] that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1117 (9th Cir. 1985) (*citing United States v. Farris*, 624 F.2d 890, 893 (1980)).

As explained above, the trust relationship is rooted in treaty and other federal commitments. *See* discussion *supra* p. 8. And, unmistakably, the rights of the Klamath Tribes are treaty-based. *See United States v. Adair*, 723 F.2d 1394, 1412 (9th Cir. 1983) (stating that the Klamath Tribes' right to water is a treaty-based right). Confidential communications are a necessary component of the trust relationship. To carry out its duties as trustee with respect to Indian trust property, the federal government must necessarily consult with Indian tribes on many complex issues regarding the establishment, management, and protection of such property. Such consultation has been mandated

by the President,[5] the Department of the Interior,[6] Congress,[7] and the courts.[8] Common sense also dictates that open communication between trustee and beneficiary is vital to managing and protecting the trust corpus. Indian tribes often know their resources far better than federal officials perhaps located, as in the Klamath Tribes' case, hundreds of miles away.

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[5] *See* Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998) (requiring regular and meaningful consultation with tribal governments on a government-to-government basis to address issues concerning tribal trust resources); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (1996) (requiring federal agencies to accommodate access to and ceremonial use of Indian sacred sites and avoid adversely affecting their physical integrity).

[6] *See* Department of the Interior Departmental Manual, Pt 512 § 2.2 (1995) (requiring all agencies within the Department of the Interior to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources and providing confidentiality assurances).

[7] *See* 25 U.S.C. § 162a(d)(8) (Supp. 2000) (requiring Secretary of Interior to "appropriately manage the natural resources located within the boundaries of Indian reservations and trust lands."); 25 U.S.C. § 3601(2) (Supp. 2000) (stating that United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government); 2 U.S.C. § 1534(a) (1994) (requiring federal agencies to develop an effective process to permit tribal officers to provide meaningful and timely input in development of regulatory proposals).

[8] *See Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509, at *7-8 (D. Or. Oct. 2, 1996) (discussing procedural duty that arises from trust relationship such that the federal government must consult with Indian tribes in the decision-making process to avoid adverse effects on treaty resources).



If Congress had intended the extraordinary result of eviscerating the trust relationship by making sensitive trust communications public, it would have been required to make its intent "clear," "plain," or manifest in the language or legislative history. *Dion*, 476 U.S. at 738-740. As nothing in the language of FOIA or its legislative history suggests that Congress intended to abrogate tribal rights to the fiduciary relationship with the United States, the rights of the Klamath Tribes to confidential communications in the context of this relationship remain intact.

As the question here is whether FOIA abrogates tribal rights to the trust relationship, the court was bound to consider that relationship in its analysis, which it did not do. Proper analysis leads to the conclusion that Congress did not intend through FOIA to abrogate that relationship. *Amici* respectfully urge this Court to grant the United States Petition for a Writ of *Certiorari* to afford proper consideration of this question and to reverse the lower court's error.

### B. Exemption 5 Of The Freedom Of Information Act Shields Confidential Communications Between Tribes And The United States About Tribal Trust Resources

Assuming, *arguendo*, that FOIA does apply in the instant situation, the failure of the court below to consider the trusteeship led it to the incorrect conclusion that Exemption 5 does not protect the documents from disclosure.

The United States' Petition sets out and discusses the current state of the law surrounding FOIA Exemption 5 and the "functional test" under which the proper judicial inquiry is into the role and function of the document in the agency's decision making process. Petition at 4-6 and 19-22. That discussion will not be repeated here. The point deserving emphasis here is the degree to which the departure by the court below from this established precedent – and the new "interest test" created by that court for purposes of Exemption 5 analysis – is inconsistent with the trusteeship obligations assumed by the United States pursuant to this Court's jurisprudence.

In reaching its decision, the majority of the court below hinged its opinion on the fact that the Klamath Tribes have an interest in the water resources under scrutiny. Citing *Skokomish Indian Tribe v. Federal Energy Regulatory Commission*, 121 F.3d 1303, 1308 (9th Cir. 1997), the court reasoned that the agency should not "afford [the Klamath Tribes] greater rights" than other parties "under the regulatory scheme." Petition at App. 10a. The lower court misapprehended the issue, however. The point here is not to afford the Klamath Tribes greater rights but to determine whether Exemption 5 shields documents exchanged between the United States and tribes about tribal trust resources within the context of the federal-tribal trust relationship.[9] As the United States properly

[9] This case concerns the situation where the United States is acting as a trustee and where the communications between the trustee an the beneficiary tribes are sensitive documents that directly concern the tribal trust resource, or trust corpus. It is thus unlike *County of Madison, New York v. Dep't of Justice*, 641 F.2d 1036 (1st Cir. 1981), where the United States was not acting as tribal trustee but stood in the position of adversary, and *Indian Law Resource Ctr. v. United States Dep't of Interior*, 477 F. Supp. 144 (D.D.C. 1979), where non-sensitive documents were subject to disclosure.



explains, had the lower court considered the role of the documents and the trust relationship, it would have found the documents exempt from disclosure under Exemption 5. *See* Petition at 14-28.

By ignoring the broader context of the trust relationship, the opinion below results in what the United States appropriately terms a "perverse" analysis in which the very interest that creates the federal trusteeship serves as the agent that destroys the confidentiality – and, thus, the soul – of the trusteeship. *See* Petition at 20. Through this perversion, the court has rendered the trust relationship a threat rather than a protection for tribes. Such a profound and incorrect result warrants review and reversal by this Court.

## CONCLUSION

The Ninth Circuit's decision drastically alters the historic federal-tribal trust relationship and undermines the federal trust duty to manage and protect tribal resources. Because of the devastating impact this case will have on the federal trust relationship, a relationship this Court has been overwhelmingly influential in defining, this case merits review by this Court. The Supreme Court should be the final arbiter of whether the Ninth Circuit's interpretation and application of FOIA fits

within the cosmos of cases with which it has defined federal-tribal relations. For these reasons, *Amici* respectfully request this Court to grant the United States' Petition for a Writ of *Certiorari* and reverse the Ninth Circuit decision on this issue.

Respectfully submitted,

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In The

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,

*Petitioners,*

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF *AMICI CURIAE* OF THE UTE INDIAN TRIBE, BLACKFEET INDIAN TRIBE, SHOSHONE-PAIUTE INDIAN TRIBES AND SAN JUAN SOUTHERN PAIUTE TRIBE IN SUPPORT OF PETITIONERS

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## IDENTITY AND INTEREST OF AMICI CURIAE[1]

The United States' Petition for Writ of *Certiorari* seeks this Court's review of the decision in *Klamath Water Users Protective Association v. Department of the Interior*, 189 F.3d 1034 (9th Cir. 1999) ("*Klamath*").[2] Therein, the Court of Appeals for the Ninth Circuit held that documents exchanged between the Klamath Basin Tribes and the United States acting as the Tribes' trustee are not protected from disclosure under Exemption 5 to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5).

*Amici* include four Indian tribes, each of which is involved, together with the United States, in the negotiation or litigation of their water right claims. The Ute Indian Tribe of the Uintah and Ouray Reservation holds water rights in the Green River Basin, a sub-basin of the Colorado River. The Blackfeet Indian Tribe of the Blackfeet Reservation is located in Montana on the U.S.-Canadian border. It holds water rights in the Missouri River Basin and in the Hudson River Basin. The Shoshone Paiute Tribes of the Duck Valley Reservation have water rights in Nevada and Idaho from the Owyhee River within the Snake River Basin. The San Juan Southern

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[1] The parties' have written consent to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] The decision is included in the Petitioner's Appendix at 1a-30a. The unreported decision of the district court is found at Pet. App. at 31a-32a, and the magistrate's findings and recommendations are at Pet. App. at 33a-71a.

Paiute Tribe claims water rights in the Little Colorado River Basin within Arizona.

The water rights of each Tribe are subject to a pending basin-wide, state general stream adjudications. Each is currently negotiating with the respective States within the context of the adjudications to resolve the complex issues surrounding the nature and extent of the Tribes' water rights. In the course of negotiations, the United States, through the Bureau of Indian Affairs ("BIA"), has participated and worked with the Tribes in negotiations and in preparation for potential litigation. The BIA has requested and received from the Tribes extensive information including tribal views on the nature, extent and legal grounds in support of their water right claims, information similar to that provided by the Klamath Basin Tribes in their correspondence that was the subject of the *Klamath* case. The Tribes' documents were provided to the BIA with the understanding that the documents were confidential and privileged and would not be subject to public disclosure, especially to parties who oppose or seek to limit the extent of the Tribes' water rights. The Tribes maintain a significant interest in ensuring that the information exchanged between themselves and the federal agency acting as their trustee concerning a broad array of issues involved in the negotiation, litigation and settlement of their water right claims remains out of the reach of adversaries, except within traditional litigation discovery rules. As a result of *Klamath*, *amici's* previously exchanged *confidential* communications with their trustee regarding their water rights, as well as other natural resource issues, may now be subject to public disclosure. Moreover, any future exchange of information will be



strictly limited because of the very real threat of disclosure. The result will be a substantial chilling effect on the progress of negotiated settlements and coordination of litigation efforts.

## STATEMENT OF THE CASE

### A. Background

The United States holds Indian lands and their resources in trust, and is bound by an explicit duty to assist tribes in the protection, management and use of their lands and resources. *See United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987); *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The trust relationship requires the federal government to act in accordance with "the most exacting fiduciary standards" where any tribal interest is implicated. *See Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942); *Shoshone Tribe v. United States*, 299 U.S. 476, 497-498 (1937). To properly carry out its legally mandated trust responsibility, federal policy requires agencies to "establish regular and meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices on Federal matters that significantly or uniquely affect their communities," Exec. Order No. 13084, 63 Fed. Reg. 27655 (1998), and to keep the consultations confidential, *see* Department of the Interior, Department Manual: Part 512 American Indian and Native Alaskan Programs, Departmental Responsibilities for Indian Trust Resources § 2.4.B (1995).

The Department of the Interior ("Department"), through the Bureau of Reclamation, administers the Klamath Project. The Project irrigates lands in the

Klamath River Basin in Oregon and California. Four Klamath Basin Tribes, the Klamath Tribe in Oregon, and the Yurok, Hoopa Valley, and Karuk Tribes in California have water rights in the Basin. *Klamath*, 189 F.3d at 1035. In 1995, the Department announced it would develop a long-term plan for the operation of the Project (the "KPOP"). *Id.* To assist in fulfilling its trust obligation, and in development of the KPOP, the Department entered into a Memorandum of Agreement with the Klamath Basin Tribes formalizing the Tribes' roles as consultants to the Department. *Id.* at 1036. In accordance with the MOA, the BIA requested documents from the Tribes which were utilized to assure that as the Department deliberated and developed the KPOP, the Klamath Basin Tribes' rights and interests would be understood and protected, and that positions taken in the KPOP process were consistent with positions taken on behalf of the Klamath Tribe in the water right adjudication established by the State of Oregon. *Id.* at 1035-36. The KPOP will be finally developed and implemented by the Bureau of Reclamation following input, comment and review not only from the BIA and Tribes, but from other federal agencies, water users and other affected parties. *Id.* at 1047 (Hawkins, J., dissenting).

As noted above, the Department, as trustee, through a different agency, the BIA, also is required to assert the water right claims of the Klamath Tribe in a general stream adjudication proceeding before the Oregon Department of Water Resources. *Id.* at 1036. *See United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995). *See also United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986). To fulfill its legal obligations, the BIA requested and



received documents prepared by the Tribe detailing the Klamath's claims to water in the Basin and possible legal theories to be used in the Oregon adjudication. *Klamath*, 189 F.3d at 1036. The information received from the Tribe was used by the BIA as it analyzed the facts and circumstances and ultimately determined what water right claims it would file in Oregon on behalf of the Tribe. *Id.* at 1041-42 (Hawkins, J. dissenting).

### B. Nature and Disposition of the Proceedings Below

In 1996, the Klamath Water Users Protective Association ("Association")[3] filed a broadly stated FOIA request to the BIA "for documents provided to or received from the Klamath Basin Tribes pertaining to water resource issues in the Klamath River Basin." *Id.* at 1036. In response, the Association was provided with numerous documents, and only seven were withheld by the BIA pursuant to FOIA's Exemption 5. *Id.* That exemption protects from disclosure documents that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ." 5 U.S.C. § 552(b)(5). Six of the seven documents were provided by the Tribes in response to requests by the government. They included documents detailing the Klamath Tribe's position on its water right claims in the ongoing Oregon general stream

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[3] The Association is a group of water users who are supplied with water from the Klamath Project and were involved in the public meetings regarding the KPOP. It had substantial disagreements with the positions taken by the Klamath Basin Tribes in the KPOP deliberative process. *See Klamath*, 189 F.3d at 1035.

adjudication, correspondence to the BIA from tribal attorneys for each of the Tribes expressing legal opinions on tribal resources and the extent of tribal water rights, and a memo to the BIA from a tribal biologist. *See Klamath*, 189 F.3d at 1041-42 (Hawkins, J., dissenting) (for a detailed description of the seven documents).

The Association brought suit in federal district court insisting it was entitled to view all seven of the withheld documents. The Ninth Circuit, in a 2-1 decision over a strong dissenting opinion by Justice Hawkins, reversed the district court and ordered disclosure of the seven documents. *Klamath*, 189 F.3d at 1039. The court refused to consider how the documents were employed in the agency decision making process, rejecting what it described as the District of Columbia Circuit's "expansive interpretation" of Exemption 5. *Id.* at 1038. Instead, the Ninth Circuit adopted a "direct interest" test which precludes application of Exemption 5 because the Klamath Basin Tribes provided advice (at the Department's request) on matters in which "the Tribes had their own interest and the communication presumptively served that interest." *Id.* As noted by the dissent, the result of this cursory test is, *ipso facto*, that the fiduciary relationship between Indian tribes and the United States is "a barrier to the application of the exemption . . . ." *Id.* at 1046. The result directly conflicts with the decision in *Public Citizen, Inc. v. Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997), in which the court unequivocally rejected any notion that an outside consultant's interest in the subject matter before an agency automatically precludes application of Exemption 5.



## SUMMARY OF ARGUMENT

The Ninth Circuit decision in *Klamath*, 189 F.3d 1034, directly conflicts with the test for applying Exemption 5 developed primarily by the Court of Appeals for the District of Columbia and most recently applied in *Public Citizen v. DOJ*, 111 F.3d 168. The Ninth Circuit decision, if not reviewed and reversed, will quash the vital exchange of confidential information between Indian tribes and the federal agencies entrusted with the responsibility to protect and represent their interests. Therefore, the Court should grant the United States' request and issue a Writ of *Certiorari* to review the *Klamath* decision.

## REASONS FOR ISSUING THE WRIT

### A. The Ninth Circuit "Direct Interest" Test Conflicts With the "Functional" Test Most Recently Applied by the D.C. Circuit in *Public Citizen*.

*Public Citizen* is the most recent in a long line of federal court decisions in which Exemption 5 has been applied to communications between outside consultants and federal agencies if "created for the purpose of aiding the agency's deliberative process." *Dow Jones & Co., Inc. v. Department of Justice*, 917 F.2d 571 (D.C. Cir. 1990). *Accord Formaldehyde Institute v. Dep't of Health and Human Services*, 889 F.2d 1118 (D.C. Cir. 1989); *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987); *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1979); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). *See also Brockway v. Department of Air Force*, 518 F.2d 1184 (8th Cir. 1975);

*Wu v. National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972). Exemption 5 was applied in *Public Citizen* to a FOIA request for correspondence between former Presidents and the Federal Archives, 111 F.3d 168, notwithstanding the fact that the former Presidents had a direct interest in the Archivist's ultimate determinations which made them potential adversaries. *Id.* at 171-72. Contrary to the majority view in *Klamath*, 189 F.3d at 1038, the facts in *Public Citizen* present precisely the same issues presented to the *Klamath* court, and that court's abandonment of the "functional" test in favor of a "direct interest" test directly conflicts with *Public Citizen*.

1. **The relationship between former Presidents and the Archivist in *Public Citizen* is virtually indistinguishable from the relationship between the Klamath Basin Tribes and the Department in *Klamath*.**

In *Public Citizen*, the court considered a FOIA request for correspondence submitted by former Presidents Reagan and Bush to the Federal Archives regarding restrictions upon the release of certain electronic communications produced during each Presidents' administration. 111 F.3d at 169-70. The Archivist must consult with a former President when considering allowing access to records which the President has designated restricted. The Archivist must ensure that he meets the duty to publically disclose the records as quickly and completely as possible, while protecting the interests of the President. *Id.* at 170. The court held that the communications



between the former Presidents and the Archivist regarding the release of restricted presidential communications were

> precisely the type that Exemption 5 was designed to protect. If it is to effectively deliberate, an agency may need or want to 'enlist the help of outside experts skilled at unraveling [the] knotty complexities' of 'problems outside their ken.' *CNA Financial Corp.*, 830 F.2d at 1162. The former President clearly qualifies as an expert on the implications of disclosure of Presidential records from his administration.

*Id.* at 171.

This Court is only too familiar with the "knotty complexities" of Indian water right claims, *see, e.g., Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Nevada v. United States*, 463 U.S. 110 (1983). Indian tribes like the Klamath Basin Tribes possess a unique expertise regarding their water rights and other natural resources that is essential to the Department's deliberations any time those resources are affected or at issue. The Department must consult with affected tribes to enable it to effectively "unravel" the "knotty complexities" involved in allocating water and assuring both the protection of tribal interests and reconciliation of those interests with other parties' interests.

> Much as the Klamath Basin Tribes have natural resource rights which the Bureau and Department have a duty to reconcile with other parties' claims to water, the ex-President has "rights and privileges" in records that the Archivist has to

> reconcile with duties to the public to make records available. The mandated consideration that the Bureau and Department have to give to the Klamath Basin Tribes' claims virtually requires that they consult the Tribes, much as the Archivist consulted the ex-President, to seek their particular expertise concerning their rights, and how they wish to assert them in the KPOP and Oregon adjudication.

*Klamath*, 189 F.3d at 1045 (Hawkins, J., dissenting). The Klamath Basin Tribes, as did the ex-Presidents in *Public Citizen*, clearly qualify as outside experts with whom the Department is expected (indeed is legally required pursuant both to federal law and policy)[4] to consult and whose function as a consultant is an essential component of the agency's deliberative process protected under Exemption 5. To hold otherwise is directly contrary to the purposes of the Exemption and the test applied in *Public Citizen*.

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[4] The Department was explicitly bound to consult with the Klamath Basin Tribes pursuant to federal policy, *see* Exec. Order No. 13084, 63 Fed. Reg. 27655; DM Part 512 § 2.2, and agreement, *see* Memorandum of Agreement for the Government-to-Government Relationship in the Development of the Klamath Project Operations Plan (*cited* at *Klamath*, 111 F.3d at 1041). Moreover, the Department is legally obligated to consult with the Indian tribes pursuant to its responsibilities as a trustee. *See, e.g., U.S. v. Cherokee Nation*, 480 U.S. at 707. *See also Dow Jones*, 917 F.2d at 575 (recognizing *implicit* consultative relationships).



**2. The Ninth Circuit's determination that the Tribes' interest in the matters under consideration by the Department negates their capacity to consult directly conflicts with the determination of that issue in *Public Citizen*.**

In support of its conclusion that the Presidents' consultations were precisely the type to be protected by Exemption 5, the *Public Citizen* court focused on the role the disputed documents played in the agency's deliberative process, not the identity and interests of the document's author.

> While Public Citizen is doubtless right that a former President is not an agency under FOIA, [5 U.S.C.] §§ 551 (1), 552 (f), records of communications between an agency and outside consultants qualify as "intra-agency" for purposes of Exemption 5 if they have been "created for the purpose of aiding the agency's deliberative process." Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571, 575 (D.C. Cir. 1990) (emphasis in original); CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987). It is "irrelevant" whether the author of the documents is a "regular agency employee or a temporary consultant." Formaldehyde Institute v. Dept. of Health and Human Svcs., 889 F.2d 118, 1122 (D.C. Cir. 1989) (citations omitted).

*Public Citizen v. DOJ*, 111 F.3d at 170. *See also General Electric Company v. United States Environmental Protection Agency*, 18 F.Supp. 138 (D.Mass. 1998) (state agency qualified as outside consultant for purposes of Exemption 5). While FOIA's "dominant objective" may be "disclosure, not secrecy," *Klamath*, 189 F.3d 1037 (citations omitted),

> efficient government operations require open discussions among all government policy-makers and advisors, whether those giving advice are officially part of the agency or *are solicited to give advice only for specific projects.*

*Ryan v. DOJ*, 617 F.2d at 790 (emphasis added). Exemption 5 seeks to assure federal agency access to complete, accurate and candid information regardless of its source.

In reaching its determination that the correspondence from the ex-Presidents was aiding the Archivist's deliberative process and, therefore, protected from disclosure under Exemption 5, the court considered and rejected several challenges,[5] including the claim that the former Presidents' "distinct and independent interest" in determining the time frame and restrictions on the public disclosure of certain presidential records made them adversaries rather than consultants, thereby removing the documents from Exemption 5's purview. *Id.* at 171.[6] While

[5] The court described these challenges as "false dichotomies." *Id.* at 171.

[6] The court in *Public Citizen* noted that "the former President in this context can hardly be viewed as an ordinary private citizen," acknowledging his continuing power to assert executive privilege. 111 F.3d at 170. Although not able to avail themselves of executive privilege, Indian tribes have never been viewed as ordinary private citizens. Their unique political status has long been recognized by the judiciary, *see, e.g., Worcester v. Georgia*, 31 U.S. 515 (1832); *Morton v. Mancari*, 417 U.S. 535 (1974), and Congress, *see, e.g.*, 25 U.S.C. §§ 450a-450n (The Indian Self-Determination and Education Assistance Act). Moreover, their status as sovereigns further distinguishes Indian tribes from ordinary citizens or organizations. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-12 (1940).



the former Presidents clearly advocated their positions regarding the release of documents which they had previously restricted, the *Public Citizen* court rejected any notion that "the consultative relationship is . . . mutually exclusive with any" other relationship, including that of advocate. *Id.* Moreover, the court concluded, "[t]he potential for an adversary relationship" between the ex-Presidents and the Archivist, "is not enough to negate one of consultation." *Id.* The Presidents' independent and direct interest in protecting certain communications from disclosure, in the court's view, did not preclude the Archivist from seeking their expertise in resolving issues related to those same communications. *Id.*[7] *See also Ryan v. DOJ*, 617 F.2d 781 (senators, who have a direct interest in selecting federal court judges, treated as outside consultants in responding to Justice Department questionnaire inquiring about procedures for selecting and recommending potential federal judge nominees).

The *Klamath* court turns the *Public Citizen* analysis on its head. The court refused to even consider whether the documents at issue aided the BIA or Department in their deliberations regarding the impact of the KPOP, and the basis and extent of water right claims to be filed on behalf of the Klamath Tribe in Oregon. *See Klamath*, 189 F.3d at 1045 (Hawkins, J., dissenting). Instead, it limited its inquiry solely to determining whether the Tribes had an interest in the matters about which the Department

[7] In fact, the *Public Citizen* court expressly relied upon the Archive's explanation of its need to consult with the former Presidents. *Id.*

sought advice. *Id.* at 1038. Contrary to *Public Citizen*, the Ninth Circuit found that any interest in the matter under agency consideration establishes a "direct interest" which *is* mutually exclusive, and cannot coincide with the role of consultant.

> While it is true that the Department requested the advice of the Tribes, the matters with respect to which it sought advice were matters in which the Tribes had their own interest and the communications presumptively served that interest, even if they incidentally benefitted the Department. Thus, we conclude . . . these documents do not qualify for exemption.

*Id.* In stark contrast to the D.C. Circuit's rejection of exclusivity, 111 F.3d at 171, the *Klamath* court concluded that a party's interest in the matters before an agency *precludes* its acting as a consultant to the agency.

To bolster its refusal to follow *Public Citizen* and its predecessors, the *Klamath* court highlighted what it claims is a distinguishing factor:

> [T]his case differs from *Public Citizen v. Department of Justice*, on which the Department relies, in that it presents not simply 'the potential for an adversary relationship' but a clear and present conflict with respect to the subject matter of the documents, which is for the Department to resolve.

189 F.3d at 1038. Once again, the court misreads *Public Citizen*, wherein the potential adversarial relationship was between the former Presidents and the agency itself. 111 F.3d at 171, *accord Klamath*, 189 F.3d at 1044 (Hawkins,



J., dissenting). In *Klamath*, a potential adversarial relationship existed between the Tribes and another party interested in the outcome of the KPOP and Oregon's general stream adjudication, the Association. 189 F.3d at 1038. In fact, the relationship between the Tribes and the Department was by no means adversarial; it was cooperative. Had the majority followed the analysis utilized in *Public Citizen*, it would have looked to the Department's explanation of its need to consult with the Tribes and recognized that rather than being adversaries, the Tribes were "sharing proposed strategies" with the Department and assisting BIA employees in "understand[ing] the Tribes' natural resource rights and formulat[ing] policy accordingly." *Klamath*, 189 F.3d at 1045 (Hawkins, J., dissenting). While the *Klamath* court also appears to recognize a potential for an adversarial relationship between the Tribes and Department within the KPOP process, *see Klamath*, 189 F.3d at 139, that potential was no greater than the potential in *Public Citizen* that the Presidents' relationship with Archivist would become adversarial. Such "potential" without "any movement in that direction", *Public Citizen v. DOJ*, 111 F.3d at 171, was insufficient to overcome the Klamath Basin Tribes' role as a consultant regarding their rights and interests in the Klamath River Basin.[8]

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[8] The *Klamath* court's reliance on *County of Madison v. United States Department of Justice*, 641 F.2d 1036 (1st Cir. 1981), is equally misplaced. There, the crucial factor in the decision not to apply Exemption 5 was that the documents involved related to litigation *between* the Oneida Nation and the United States, where they were "past and potential adversaries, not coopted colleagues." *Id.* at 1040 (the Nation had sued the United States in the Claims Court and was seeking to determine how a

The result of the Ninth Circuit's "direct interest" test undermines any ability of Indian tribes to confidentially share information regarding their natural resources with any federal agency. Nothing prepared by an Indian tribe for consideration by a federal agency can fall within the protective sphere of Exemption 5 because *Indian tribes always have a "direct interest" in their natural resources and federal agency actions affecting those resources.* The "direct interest" test abandons any consideration of the function the documents play within the agencies' deliberative process, *see Klamath,* 189 F.3d at 1044 (Hawkins, J., dissenting). It cripples the ability of Indian tribes to effectively consult with their trustee in a confidential forum. It undermines the ability of all federal agencies, particularly the BIA, to fulfill their legally mandated trust responsibilities. And, it impacts every party to any proceeding in which a federal agency is required to protect or assert tribal interests and is unable to confidentially communicate with the affected Indian tribe.

As pointed out by the dissent *in Klamath*: "[I]n an effort which marginally advances the cause of open government, [the majority] winds up punishing entities the

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settlement of that litigation might affect its land claim). Importantly, the documents were not provided at the request of the United States, but were initiated by the Nation in an effort to procure its own advantage. *Id.* at 1041-42 ("[T]he Oneidas approached the government with their own interests in mind."). The *County of Madison* court found this factor a "crucial" difference between its case and others (like *Klamath*) where the government requests information from outside consultants to aid in policy deliberations. *Id. But see Formaldehyde Institute,* 889 F.2d at 1124 (rejecting as "shortsighted" a claim that "there can be no Exemption 5 coverage because the outside reviews were not solicited by" the agency.).



government has a fiduciary duty to protect." 189 F.3d at 1039. Such a gross departure from the purposes of Exemption 5 and the underpinnings of the trust relationship demands issuance of the Writ of *Certiorari* and this Court's review.

### 3. This Court must resolve the two conflicting standards for determining when to apply Exemption 5 to FOIA's disclosure requirements.

*Klamath* and *Public Citizen* present two conflicting standards for evaluating the application of Exemption 5 which cannot be reconciled. *Public Citizen's* well-reasoned and consistently applied test developed over the past 25 or more years correctly focuses the inquiry on the purposes for which Exemption 5 was included in FOIA, while the result in *Klamath* stands as a barrier to an agency's need to make decisions with as much information as possible provided in a candid manner. By paying no heed to the purpose for which the document is required by the agency, the "direct interest" test conflicts with the purposes for which Exemption 5 was crafted. The Court should issue the Writ of *Certiorari* to resolve the conflicting standards for evaluating the applicability of Exemption 5, and to assure the continuing ability of federal agencies to confidentially consult with and fulfill their legal responsibilities to Indian tribes.

## B. The *Klamath* Decision Has Broad Ramifications Throughout the Nation For Indian Tribes and For Those In Proceedings Involving or Affecting Tribal Interests.

As a consequence of its role as trustee, the BIA currently represents the interests of many Indian tribes in

numerous judicial and administrative proceedings, both formal and informal. These proceedings involve not only tribal water rights, but tribal rights in land, minerals, timber, fish and wildlife, and other resources. The BIA regularly seeks tribal expertise as it attempts to understand the rights and interests of the tribes it represents. Tribes are intimately familiar with their lands and resources that are held in trust for them by the United States. Federal agencies are often located hundreds of miles from tribal lands, and important decisions regarding them are often made by people without firsthand knowledge of the resources they have a duty to protect. Tribal input and expert advice are crucial when federal policy affects tribal resources.

Within the specific context of water rights, the *Klamath* decision will have a disastrous effect, and its impacts will be felt throughout almost every western state. Currently there are 18 ongoing proceedings in which the water rights of various Indian tribes are at issue. They involve most of the western states, including Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming, as well as many of the Nations' most important river systems including the Colorado, Missouri, Snake and Columbia Rivers. As in *Klamath*, the BIA prepares and submits claims for tribal water rights, and, perhaps most importantly, negotiates with and on behalf of tribes in settlement discussions.

The need for the BIA to communicate confidentially with those it represents cannot be overstated, and the impact of exposing these communications extends well beyond the agency decision making process. Without an exchange of complete and accurate information between



Indian tribes and their trustee, the likelihood of settling tribal claims and avoiding years upon years of costly litigation, *see, e.g., In re Rights to Use Water In Big Horn River*, 753 P.2d 76 (Wyo. 1988), *aff'd by an equally divided court, Wyoming v. United States*, 492 U.S. 406 (1989), becomes more remote. The fact that parties who oppose tribal claims or maintain opposing interests will have access to any documents exchanged between an Indian tribe and a federal agency will inevitably force tribes to stop sharing information to the detriment not only of Indian tribes and the United States, but ultimately to all those involved in any litigation, negotiations or settlement discussions involving tribal claims or interests.

Finally, the impact of the *Klamath* decision is not limited to water rights proceedings or to the western United States. Any exchange of documents between an Indian tribe and a federal agency regarding a tribe's resources, whether it be water, minerals, timber, fish and wildlife, or land will be subject to disclosure. Tribes throughout the country are affected. For example, in the east, most recently in New York, the United States represented the Seneca Nation and the Cayuga Indian Nation in land claims asserted against state and counties. In these land claim cases, the United States and Tribes, as they do in water right proceedings, worked together in a cooperative relationship to identify, prepare and pursue tribal aboriginal claims to land taken in violation of federal law, often hundreds of years ago. These claims are steeped in a complex historic and legal web that requires confidential communication and consultation between the United States and the affected tribes as they prepare and pursue their claims and strategy. Obviously, the Tribes have a very direct interest in the outcome of the land claim cases, and

the Ninth Circuit's "direct interest" test, if applied, would render cooperation between Indian tribes and their federal representatives virtually impossible.

## CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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In the

# *Supreme Court of the United States*

October Term, 1999

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,

*Petitioners*,

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

*Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF OF *AMICI CURIAE* THE EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, LUMMI NATION, PUEBLO OF SAN FELIPE, TOHONO O'ODHAM NATION, AND ZUNI INDIAN TRIBE SUPPORTING THE UNITED STATES' PETITION FOR WRIT OF CERTIORARI

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## BRIEF OF *AMICI CURIAE* THE EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, LUMMI NATION, PUEBLO OF SAN FELIPE, TOHONO O'ODHAM NATION, AND ZUNI INDIAN TRIBE SUPPORTING THE UNITED STATES' PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 37 of the Rules of the United States Supreme Court, the Eastern Shoshone Tribe of the Wind River Reservation of Wyoming, Lummi Nation of Washington, Pueblo of San Felipe of New Mexico, Tohono O'odham Nation of Arizona, and Zuni Indian Tribe of New Mexico and Arizona respectfully file this brief as *amici curiae* in support of the United States' Petition for a Writ of Certiorari, seeking review of the divided decision of the United States Court of Appeals for the Ninth Circuit entered on August 31, 1999, and reported at 189 F.3d 1034. Both Petitioner United States and Respondent Klamath Water Users Protection Association have granted their consent to the filing of this *amici curiae* brief. The parties' written consents previously have been placed on file with the Clerk of this Court.

## INTEREST OF *AMICI CURIAE*

The Eastern Shoshone Tribe of the Wind River Reservation of Wyoming, Lummi Nation of Washington, Pueblo of San Felipe of New Mexico, Tohono O'odham Nation of Arizona, and Zuni Indian Tribe of New Mexico and Arizona (collectively "*Amici Curiae*" or "Tribes") are five federally-recognized Indian tribes that possess extensive natural resource holdings, including water rights, held in trust for them by the United States. It is no exaggeration to say that the Tribes' natural resource holdings are among their greatest assets.[1] To ensure that those assets are properly protected, each of the Tribes traditionally has engaged in regular consultations with the federal government, particularly with personnel of the Bureau of Indian Affairs ("BIA"), concerning the protection and management of their trust resources. These consultations are a natural

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[1]This crucial importance arises generally because most Indian tribes lack the tax base and other sources of revenue typical of state and local governments. In the absence of other revenue streams, the importance of a tribe's natural resource holdings as a means of raising revenue is magnified. Of perhaps even greater and more fundamental importance, however, is the role that tribal land and water resources play in the cultural and spiritual life of a tribe. *See, e.g.*, Law and Order Code of the Shoshone and Arapahoe Tribes of the Wind River Reservation, Wind River Water Code, § 11-8-1(A)(1) ("The Tribes find that all Reservation natural resources are interconnected; and that the water resource has cultural, spiritual and economic values that guide the appropriate use, management and protection of that resource and that condition all water and land use activities in the watersheds and drainage basins of the Reservation.").

outgrowth of the federal government's trust responsibility to the Tribes: because the Tribes possess much of the information the federal government needs to protect and manage the Tribes' natural resources, the federal government consults with the Tribes to obtain this information. The federal government's fulfillment of its trust duty as it concerns the Tribes' natural resource holdings largely depends upon the regular exchange of views and information between itself and the Tribes. Indeed, current federal Indian policy mandates greater tribal control over tribal trust resources, subject only to overriding federal supervisory authority. *See* 25 U.S.C.A. § 450a(b) (Supp. 2000) (Indian Self-Determination and Education Assistance Act). Nowhere is the imprint of this policy more apparent than in the management of water resources. *See* 33 U.S.C.A. § 1377 (Supp. 2000) (Clean Water Act); 42 U.S.C.A. § 300j-11 (Supp. 2000) (Safe Drinking Water Act). *See also City of Albuquerque v. Browner*, 97 F.3d 415, 418 (10th Cir.), *cert. denied*, 522 U.S. 965 (1997) (by "amend[ing] the Clean Water Act to authorize the . . . EPA to treat Indian tribes as states under certain circumstances for purposes of the Clean Water Act[,] . . . Congress merged two of the four critical elements necessary for tribal sovereignty – water rights and government jurisdiction – by granting tribes jurisdiction to regulate their water resources in the same manner as states").

*Amici Curiae* are deeply troubled that the practical result of the Ninth Circuit's decision will be to stifle, if not end, the open and candid exchange of views and information between Indian tribes and the federal government that is vital to the government's proper exercise of its trust responsibility to protect tribal trust resources. Knowing that the information they submit to the BIA now will be available under the Freedom of Information Act ("FOIA") to their adversaries, the Tribes already have ceased providing proprietary information about their land and water resources to the federal government, even in the context of active litigation. In light of the vital role that the exchange of information between Indian tribes and the federal government plays in the protection and management of tribal trust resources, the Tribes fear that the decision below will leave the federal government unable to fulfill properly its role as trustee and ultimately result in the evisceration of the trust responsibility. Such a result will be devastating to Indian tribes, which in large part have no choice but to rely on the federal government to protect their trust resources, especially their water rights.

## REASONS FOR GRANTING THE PETITION

This Court has long recognized that the rights possessed by Indian tribes to natural resources, and in particular their rights to water, "[are] not much less necessary to the existence of the Indians than the atmosphere they breathe[ ]." *United States v. Winans*, 198 U.S. 371, 381 (1905). Pursuant to its trust responsibility to manage and protect the property of



Indian tribes, it falls largely to the federal government to assert tribal water rights claims. 25 U.S.C.A. § 175 (1983). Water rights claims for tribes must encompass both present and future needs, since water adjudications determine rights for all time pursuant to the doctrine of finality. *Arizona v. California*, 460 U.S. 605, 618-619 (1983). This mandate is enormously challenging. The ability of the federal government to fulfill its solemn trust duty in this area historically has depended upon the maintenance of a close and confidential working relationship with the Indian tribes, whose intimate knowledge of their land and water resources is indispensable to the federal government's advancement of their claims. Confidentiality and cooperation have always been the hallmarks of this trustee-beneficiary relationship. The decision of the court of appeals in this case, however, interprets the FOIA to mandate the disclosure of information exchanged in furtherance of this relationship, thereby removing the element of confidentiality. When confidentiality is stripped from the trust equation, the federal government's ability to assert tribal water rights claims is threatened, and the very foundation of the trust responsibility itself is cast into doubt.

Previous decisions of this Court construing the McCarran Amendment, 43 U.S.C.A. § 666 (1986), direct that the adjudication of the existence and quantity of federal reserved water rights for Indian tribes, in addition to other federal reserved water rights, take place in the course of general stream adjudications. *See, e.g., Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 566 n.17 (1983) (". . . although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did (as we made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings.") (emphasis in original); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). As the Court also has made abundantly clear, a judgment entered against the United States regarding the adjudication of Indian reserved water rights is binding against an Indian tribe whose rights are adjudicated and quantified. *Nevada v. United States*, 463 U.S. 110, 135 (1983); *San Carlos Apache Tribe of Arizona*, 463 U.S. at 566 n.17. Although an Indian tribe may seek leave to intervene in the state proceedings to protect its own interests, primary responsibility for the litigation of Indian reserved water rights claims lies with the United States. Regardless of whether it decides to participate directly in a judicial proceeding in which its water rights will be quantified, an Indian tribe will be bound by the decision of the state tribunal establishing the existence and quantity of the right.

The relationship between an Indian tribe and the federal government arising out of the McCarran Amendment's mandate that the United States assert Indian reserved water rights claims in general stream adjudications is that of allies aligned in the pursuit of an identical interest, for the simple reason that the Indian tribe will be bound by the decision

reached in the proceeding in which the federal government represents its interests. It follows that an Indian tribe must do everything in its power to ensure that the federal government pursues a claim for that amount of water to which the tribe believes it is entitled for all time pursuant to *Winters v. United States*, 207 U.S. 564 (1908). This is especially true in light of the federal government's additional duty to press competing federal reserved water rights claims in the same proceeding. As *Nevada v. United States*, *supra*, demonstrates, the "conflict of purposes" faced by the United States because of its duty to advance competing federal reserved water rights claims places a great deal of responsibility on the Indian tribe whose water rights are at stake to ensure that the federal government does not undervalue its claims. *Id.*, 463 U.S. at 137 n.15. Simply put, history has taught that it is the Indian tribes themselves, through a combination of candidness and cooperation, who must ensure the adequacy of the federal government's representation of them in the water rights area.[2] The stakes are high; failure will mean the loss of federal water rights, a property right precious to Indian tribes, forever.

As a practical matter, Indian tribes play an integral, if not predominant, role in the development of the federal reserved water rights claims that the federal government is required to advance on their behalf for two other reasons. First, no one possesses a more intimate knowledge of a geographical area's land and water resources than the Indian people who have occupied the area since time immemorial. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984) ("The Klamath Indians have hunted, fished, and foraged in the area of the Klamath Marsh and upper Williamson River for over a thousand years."). The historical knowledge that the Lummi Nation possesses of its salmon fishery and that the Zuni Indian Tribe possesses of its agricultural and religious use of the Zuni Heaven portion of its reservation, for example, is unique and proprietary. That knowledge has been absolutely vital to the proper development of those Tribes' respective claims for water: in the Lummi Nation's case, in a reservation groundwater adjudication; for the Zuni Indian Tribe, in the Little Colorado River general stream adjudication.

[2]Once decreed, an Indian tribe is bound by the quantification of its water rights. This is true even if the tribe later can prove that the United States violated its trust responsibility. In such a case, an Indian tribe's only remedy is against the United States for money damages in a breach of trust action. *See Nevada*, 463 U.S. at 144 n.16; *id.* at 135 n.14. From the perspective of an Indian tribe, the best possible outcome of a general stream adjudication quantifying its water rights is a final decree awarding it all the water to which it is entitled under prevailing law, not some lesser amount of water and a colorable breach of trust claim against the federal government. Success in a breach of trust action is never a substitute for water forever lost.



In developing water claims, Indian tribes typically supplement their historical knowledge with hydrologic and economic development studies.[3] Such studies tend to be expensive and time consuming. The federal government requires that an Indian tribe share both types of information before it will press a water rights claim on behalf of a tribe. For the federal government to obtain such information independently would be costly and needlessly duplicative; in the case of historical and economic data, where an Indian tribe may be the sole source of such information, it may be impossible.

Second, that an Indian tribe tends to take the lead in developing the water rights claim the federal government ultimately will advance on its behalf makes further sense when one considers the number of such cases in which the United States is obligated to represent tribal interests. *See* Pet. for Writ of Cert. at 27. *See also* 25 U.S.C.A. § 175 (1983). With its resources dispersed among such a multitude of cases, the federal government simply cannot be expected to develop on its own the detailed body of knowledge necessary for proper litigation of an Indian water rights claim, especially when compared with the wealth of information in the possession of an Indian tribe whose focus is concentrated on its own claim.[4] In fact, the federal government historically has relied heavily upon Indian tribes not only for factual documentation to support their water rights claims, but also for their legal analyses and theories regarding the scope of those claims. In short, Indian tribes are chiefly responsible for developing and shaping their water rights claims, even though the federal government is required to submit the claims for the tribes' benefit. Without an Indian tribe's contribution of factual information and legal analysis, the United States would be handicapped in its ability to represent the tribe's interests in the manner that the high fiduciary standards of the trustee's role requires, and the tribe's interests would be severely jeopardized.

The majority decision of the court of appeals penalizes the Klamath Indian Tribes for cooperating with the federal government (at the government's request) to ensure proper execution of the trust responsibility. The court of appeals correctly observed that Indian tribes have a direct interest in their natural resources and thus in the subject matter of the consultations at issue here. The court erred when it relied upon this interest

[3]For example, a tribe's municipal, domestic, industrial, and commercial claims depend largely on its plans for future economic development. Such plans, which are confidential, contain information that is absolutely vital to the proper development of a tribe's water rights claims.

[4]Because of the requirement that it adjudicate all competing federal reserved water rights claims in the general stream adjudication to which they are relevant, the federal government's resources are further diluted within the case itself, where the tribal interest is but one of the many the United States is obliged to represent.

as the basis for ordering the Department to disclose privileged documents provided by the Tribes to assist the United States fulfill its trust obligations, rather than focusing on the function of the documents within the Department's deliberative process.

It cannot be stressed enough that this Court's decision in *Nevada v. United States*, *supra*, instructs Indian tribes that the water rights claims advanced on their behalf by the United States in a general stream adjudication must include the entire quantity of water to which the tribes believe themselves forever entitled under the law; any claim not so advanced and not ultimately made part of the final decree in the proceeding will forever be lost. *Id.*, 463 U.S. at 135. In light of this clear directive, as well as the fact that the very nature of the trustee-beneficiary relationship compels cooperation on the part of Indian tribes and the federal government, the appeals court's conclusion that the tribes' "direct interest" requires public disclosure is fundamentally flawed. The practical effect of the court of appeals' decision is to drain the trust relationship of all its vitality.

## CONCLUSION

As evidenced by the divided decision of the Ninth Circuit below, this case raises a question of exceptional importance concerning the continuing viability of government-to-government relations between the United States and Indian tribes under their historic trust relationship, long recognized as "one of the primary cornerstones of Indian law." F. Cohen, *Handbook of Federal Indian Law* 221 (1982 ed.). Because Indian tribes *always* have a direct interest in the natural resources held in trust for them by the United States, the court of appeals' decision effectively endorses the use of the FOIA as a tool to circumvent the necessarily confidential communications between tribes and the federal government concerning trust resources. Because the court of appeals' decision is at odds with the longstanding precedent of this Court construing the trust relationship, the decision should not be permitted to take effect without plenary review by this Court.



For all of the foregoing reasons, the United States' Petition for a Writ of Certiorari should be granted.

Dated: Albuquerque, New Mexico
July 21, 2000

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 9 2000
CLERK

No. 99-1871

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

*v.*

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED: MAY 22, 2000**
**CERTIORARI GRANTED: SEPTEMBER 26, 2000**

146 pp

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON (MEDFORD)

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Civil Docket No. 96-CV-3077

KLAMATH WATER USERS

*v.*

DEPARTMENT OF INTERIOR, ET AL.

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**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 10/22/96 | 1 | COMPLAINT (Cause Code: 05:0552fi) Receipt # 7599 (cwm) [Entry date 10/23/96] |
| | | * * * * * |
| 12/4/96 | 10 | ANSWER by Defendants to complaint [1-#1] (cwm) [Entry date 12/15/96] |
| | | * * * * * |
| 3/31/97 | 21 | NOTICE by Defendants of filing of Vaughn Index (cwm) [Entry date 04/01/97] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 3/31/97 | 22 | MOTION by Defendant FOR SUMMARY JUDGMENT (cwm) [Entry date 04/03/97] |
| | | * * * * * |
| 4/15/97 | 25 | RESPONSE by Plaintiff to MOTION FOR SUMMARY JUDGMENT [22-1] (cwm) [Entry date 04/21/97] |
| | | * * * * * |
| 6/19/97 | 44 | FINDINGS AND RECOMMENDATION THAT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [22-1] SHOULD BE GRANTED (Counsel notified) (cwm) [Entry date 06/24/97] |
| | | * * * * * |
| 8/4/97 | 48 | OBJECTION to FINDINGS AND RECOMMENDATION by Plaintiff [44-1] (cwm) [Entry date 08/05/97] |
| | | * * * * * |



| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 10/16/97 | 53 | ORDER by Honorable Michael R. Hogan ADOPTING FINDINGS AND RECOMMENDATION [44-1] and GRANTING MOTION FOR SUMMARY JUDGMENT [22-1] Signed 10/16/97 (counsel notified) (wk) [Entry date 10/22/97] |
| 10/28/97 | 54 | JUDGMENT DISMISSING CASE (counsel notified) (wk) |
| | | * * * * * |
| 12/24/97 | 58 | NOTICE OF APPEAL to Court of Appeals by Plaintiff from judgment Receipt # 8400 (wk) |

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-36208

KLAMATH WATER USERS

*v.*

DEPARTMENT OF INTERIOR, ET AL.

**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| | * * * * * |
| 6/29/98 | Filed original and 15 copies Appellant Klamath Water Users opening brief (Informal: n) 45 pages and five excerpts of record in 3 volumes; served on 6/26/98 [97-36208] (hh) |
| | * * * * * |
| 8/17/98 | Filed original and 15 copies appellees DOI and Bureau of Indian Affairs' 62 pages brief; served on 8/12/98 [97-36208] (hh) |
| | * * * * * |



| DATE | PROCEEDINGS |
|---|---|
| 3/3/99 | ARGUED AND SUBMITTED TO Andrew J. KLEINFELD, Michael D. HAWKINS, William W. Schwarzer [97-36208] (br) |
| 8/31/99 | FILED OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Andrew J. KLEINFELD; Michael D. HAWKINS, dissenting; William W. Schwarzer, author.) FILED AND ENTERED JUDGMENT. [97-36208] (hh) |
| | * * * * * |
| 10/15/99 | [3772950] Filed original and 50 copies Appellee DOI petition for rehearing with suggestion for rehearing en banc; 15 p.pages, served on 10/14/99 (PANEL AND ALL ACTIVE JUDGES) [97-36208] (hh) |
| 10/22/99 | Received original and 50 copies Amici Curiae National Congress of American Indians, et al., amici brief of 8 pages; served on 10/21/99 (deficient: motion pending/PANEL) [97-36208] (hh) |

| DATE | PROCEEDINGS |
|---|---|
| 10/22/99 | Filed Amici Curiae National Congress of American Indians, et al., motion for leave to file brief amici curiae in support of defts/aples' petition for rehearing with suggestion of rehearing en banc; served on 10/21/99 [3777446] (to PANEL only) (hh) |
| 10/22/99 | Received original and 50 copies Amici Curiae Lummi Nation, Zuni Indian Tribe, Pechanga Indian and Tohono O'Odham Nation's amici curiae brief of 8 pages; served on 10/21/99 (deficient: motion pending/PANEL) [97-36208] (hh) |
| 10/22/99 | Filed Amici Curiae Lummi Nation, Zuni Indian Tribe, Pechanga Indian and Tohono O'Odham Nation's motion for leave to file brief as amici curiae supporting the US's petition for rehearing and suggestion for rehearing en banc; served on 10/21/99 [3777473] (to PANEL only) (hh) |



| DATE | PROCEEDINGS |
|---|---|
| 11/3/99 | Filed order (Andrew J. KLEINFELD, Michael D. HAWKINS, William W. Schwarzer,): Lummi Nation, et al, and National Congress of American Indians, et al, motions for leave to file brief as amici curiae in support of defts-aples' petition for rehearing and petition for rehearing en banc are GRANTED. The clerk shall file the briefs. [97-36208] (hh) |
| 11/3/99 | Filed original and 50 copies Amici National Congress of American Indians, et al., amici curiae brief of 8 pages; served on 10/21/99 (PANEL-AND ALL ACTIVE JUDGES) [97-36208] (hh) |
| 11/3/99 | Filed original and 50 copies Amici Lummi Nation, Zuni Indian Tribe, Pechanga Indian and Tohono O'Odham Nat.'s amici curiae brief of 8 pages; served on 10/21/99 (PANEL AND ALL ACTIVE JUDGES) [97-36208] (hh) |
| 12/22/99 | Filed order (Andrew J. KLEINFELD, Michael D. HAWKINS, William W. Schwarzer,): . . . The petition for rehearing and petition for rehearing en banc is DENIED. [97-36208] (hh) |

| DATE | PROCEEDINGS |
|---|---|
| 12/27/99 | Filed aples DOI and Bureau of Indian Affairs' motion for a stay of the mandate; served on 12/23/99 [3817702] (to PANEL) (hh) |
| | * * * * * |
| 1/26/00 | Filed order (Andrew J. KLEINFELD, Michael D. HAWKINS, William W. Schwarzer,): The motion of aples for a 90-day stay of the mandate, to 3/28/00, is GRANTED. The unopposed motion of aplt for an ext of time within which to file a request for attys' fees until 14 days after the deadline for aples to file a petition to the US Supreme court for a writ of certiorari, or until 14 days after the disposition of any such filed petition, is GRANTED. [97-36208] (hh) |
| 3/16/00 | Filed DOI and Bureau of Indian's consent motion for a further stay of the mandate, served on 3/15/00 [3869303] (LEAD JUDGE) (sm) |
| 3/16/00 | Received letter from the Supreme Court dated 3/10/00 re: extending the time to file petn for writ of cert to and including 4/20/00. (to AJK) [97-36208] (crw) |



| DATE | PROCEEDINGS |
|---|---|
| 4/12/00 | Filed order (Andrew J. KLEINFELD, Michael D. HAWKINS, William W. Schwarzer,): The consent motion for a further stay of the mandate, to 4/27/00, is GRANTED. [97-36208] (hh) |
| 4/17/00 | Filed Supreme Court order (SC Date: 04/10/00), granting application for a further extension of time within which to file a petition for writ of certiorari to and including 05/20/00 (CASEFILE) [97-36208] (sm) |
| 4/17/00 | Filed DOI and Bureau of Indian's consent motion to stay the mandate until 05/27/00. Served on 4/14/00 [3891935] (LEAD JUDGE) (sm) |
| 4/25/00 | Filed order (Andrew J. KLEINFELD,): Aples' consent motion for a further stay of mandate, to 5/27/00, is GRANTED. [97-36208] (hh) |
| 5/30/00 | Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 99-1871 filed on 5/22/00. [97-36208] (sm) |
| | * * * * * |

| DATE | PROCEEDINGS |
|---|---|
| 10/2/00 | Received notice from Supreme Court, petition for certiorari GRANTED on 9/26/00. Supreme Court No. 99-1871 (PANEL) (hh) |



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 96-3077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF INDIAN AFFAIRS, DEFENDANTS

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
(Freedom of Information Act;
Administrative Procedure Act)

[Oct. 22, 1996]

Plaintiff Klamath Water Users Protective Association (hereinafter 'plaintiff') alleges as follows:

JURISDICTION AND VENUE.

1. This is an action brought under the Freedom of Information Act (5 U.S.C. § 552 *et seq.*), as amended, and the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*), as amended, to enjoin the United States Department of Interior and the United States Bureau

of Indian Affairs (hereinafter "Defendants") from withholding from public disclosure certain records within their possession and control, and to direct that Defendants disclose such records to Plaintiff and grant Plaintiff's related fee waiver requests.

2. This court has jurisdiction over the claims against the Defendants pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 702, and 28 U.S.C. §§ 1331, 1361, 2201-2202.

3. Venue of this action properly lies within the District of Oregon, pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. section 1391(e).

PARTIES

4. Plaintiff Klamath Water Users Protective Association, also known as Klamath Water Users Association, is a tax-exempt, non-profit corporation organized under the laws of the State of Oregon and section 501(c)(5) of the Internal Revenue Code. Plaintiff's principal place of business is located in Klamath Falls, Klamath County, Oregon. Plaintiff is an association of individuals, firms, and public entity districts and public entity corporations who are located in Oregon and California within the Upper Klamath River Basin, as defined in the Klamath River Basin Compact. Plaintiff's members receive water from facilities constructed as part of the United States Bureau of Reclamation's ("Reclamation") Klamath Project. Plaintiff's purposes include the protection of its members' common interests in the use of water for irrigation, and the provision of information to its members and the persons represented by its members. Plaintiff has the legal authority to bring this action.



5. Defendant Department of Interior is an agency of the United States government. Defendant Bureau of Indian Affairs is a Bureau within the Department of Interior, under the supervision of the Secretary of Interior. Defendants have possession of the records to which Plaintiff seeks access.

GENERAL ALLEGATIONS

6. In February of 1995, Reclamation, an agency within the Department of Interior, announced that it would develop a plan, to be known as the Klamath Project Operations Plan ("KPOP"), to describe the future operation of the Klamath Project. Reclamation proposed in the KPOP, irrespective of state law concerning the diversion, appropriation, and distribution of water, to reallocate water away from agricultural use. Reclamation and Defendant Department of Interior represented to Plaintiffs and the public that the process for developing the KPOP would be an open, public process.

7. On information and belief, Plaintiff alleges that before, during, and after the development of the proposed KPOP, and at all relevant times, numerous persons, agencies, tribes and organizations attempted to influence Reclamation to make decisions that would allocate water away from irrigation use within the Klamath Project. Such persons included representatives of the Klamath Tribes, the Hoopa Valley Tribe, the Yurok Tribe, and the Karuk Tribe, including their attorneys and consultants (hereinafter collectively referred to as "Klamath Basin Tribes"). Such persons also included and include employees of Defendant Bureau of Indian Affairs. On information and belief, Plaintiff alleges that in the development of the proposed KPOP, Reclamation either proposed to quantify

federal reserved water rights and water rights acquired under state laws or proposed to allocate water to instream use for the benefit of Klamath Basin Tribes based on considerations other than water rights.

8. Reclamation informed the Plaintiff and the public that it would release a draft KPOP for public comment in February of 1996, and a final KPOP in March of 1996. Reclamation did not issue a KPOP as planned and represented. Upon information and belief, Plaintiff alleges that Reclamation's Area Manager prepared a draft KPOP in February of 1996 to be released for public comment, but release was withheld because of objections of dissatisfied persons within the Defendant Bureau of Indian Affairs or Defendant Department of the Interior who persuaded the United States Secretary of the Interior and/or the Office of the Secretary to prevent such release.

9. In February and March of 1996, Plaintiff submitted to Defendants, under the Freedom of Information Act, written requests for access to certain documents within Defendants' possession, and for a waiver of associated fees. These written requests sought documents evincing communications that occurred between Defendants and the Klamath Basin Tribes from January 15, 1996 through February 29, 1996, and that related to water resource issues in the Klamath River Basin. Copies of these written requests are attached hereto as Exhibit 1, and are incorporated herein by reference.

10. By letter dated June 25, 1996, Defendants issued a partial denial of Plaintiff's February and March 1996 requests. Among other things, said denial reveals frequent contact and communication between the



Klamath Basin Tribes and the Defendant Bureau of Indian Affairs immediately before, during and after the draft KPOP was being reviewed within the Department of Interior. In their denial, Defendants alleged that most of the requested documents were exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5) (hereinafter "FOIA exemption 5"). Defendants also denied Plaintiff's request for a fee waiver. This fee waiver denial was based upon Defendant's erroneous determination that the information requested was primarily in Plaintiff's commercial interest. As a result, Defendants wrongfully determined that Plaintiff's request does not meet the statutory fee waiver test set forth in 5 U.S.C. § 552(a)(4)(iii) and the United States Department of Interior regulations (hereinafter "DOI regulations") 43 C.F.R. § 2.21(a)(1)(ii). Defendants, therefore, erroneously applied the provisions of DOI regulations, 43 C.F.R. § 2.20(b) in determining the amount of fees applicable to Plaintiff's request, and issued a corresponding Bill for Collection in the amount of $95.47, which Plaintiff has not paid pending resolution of this litigation. A copy of Defendants' June 25, 1996 denial (without the released documents) is attached hereto as Exhibit 2, and is incorporated herein by reference.

11. By letter dated July 18, 1996, Plaintiff timely filed an administrative appeal to Defendants' denial in accordance with 5 U.S.C. § 552(a)(6)(A), and DOI regulations 43 C.F.R. § 2.18. A copy of this appeal (without enclosures) is attached hereto as Exhibit 3, and is incorporated herein by reference.

12. By letter dated August 20, 1996, Defendants issued a final denial of Plaintiff's February and March 1996 Freedom of Information Act requests for the

withheld records and Plaintiff's corresponding fee waiver request. A copy of this final denial is attached hereto as Exhibit 4, and is incorporated herein by reference.

13. Subsequent to the decision not to release the draft KPOP that had been planned for release in February or March of 1996, Reclamation commenced a new effort to prepare a KPOP. Reclamation also announced certain other decisions or plans with respect to water resources in the Klamath Basin that affect the interests of Plaintiff and its members.

14. By letters dated July 3, 1996, Plaintiff submitted to Defendants, under the Freedom of Information Act, written requests for access to certain documents within Defendants' possession, and for a waiver of associated fees. These written requests similarly sought documents evincing communications that occurred between Defendants and the Klamath Basin Tribes from January 1, 1996 through January 14, 1996, and March 1, 1996 through July 3, 1996, and that related to water resource issues in the Klamath River Basin. Copies of these written requests are attached hereto as Exhibit 5, and are incorporated herein by reference.

15. By letter dated August 2, 1996, Defendants denied Plaintiff's request for a fee waiver associated with Plaintiff's July 3, 1996 Freedom of Information Act requests. This denial was based upon Defendants' erroneous determinations that the information requested was primarily in Plaintiff's commercial interest, and was primarily informative to a narrow segment of persons rather than the general public. As a result, Defendants wrongfully determined that Plaintiff's request does not meet the statutory fee waiver test set



forth in 5 U.S.C. § 552(a)(4)(A)(iii) and DOI regulations 43 C.F.R. § 2.21(a)(1)(ii). Defendants, therefore, erroneously applied the provisions of DOI regulations 43 C.F.R. § 2.20(b) in determining the amount of fees applicable to Plaintiff's request, and issued a corresponding Bill for Collection in the amount of $240.29. Plaintiff paid this amount under protest and with Defendants' agreement that the payment would be refunded if Plaintiff's waiver request was upheld in an administrative appeal or litigation. Copies of Defendants' August 2, 1996 denial and the corresponding Bill for Collection are attached hereto as Exhibit 6, and are incorporated herein by reference.

16. By letter dated August 5, 1996, Plaintiff timely filed an administrative appeal to Defendants' fee waiver denial in accordance with 5 U.S.C. § 552(a)(6)(A), and DOI regulations 43 C.F.R. § 2.18. A copy of this appeal (without enclosures) is attached hereto as Exhibit 7, and is incorporated herein by reference.

17. By letter dated September 6, 1996, Defendants issued a final denial of Plaintiff's July 3, 1996 fee waiver request. A copy of this final denial is attached hereto as Exhibit 8, and is incorporated herein by reference.

18. By letter dated September 4, 1996, Defendants issued a partial denial of Plaintiff's July 3, 1996 Freedom of Information Act requests, wherein Defendants similarly alleged that most of the requested documents were exempt from disclosure pursuant to FOIA exemption 5. The denial reveals frequent contacts between Defendants and the Klamath Basin Tribes that relate to the vital interests of Plaintiff and its members. A copy of Defendants' September 4, 1996 denial

(without the released documents) is attached hereto as Exhibit 9, and is incorporated herein by reference.

19. By letter dated September 13, 1996, Plaintiff timely filed an administrative appeal to Defendants' partial denial in accordance with 5 U.S.C. § 552(a)(6)(A), and DOI regulations 43 C.F.R. § 2.18. A copy of this appeal (without enclosures) is attached hereto as Exhibit 10, and is incorporated herein by reference.

20. On information and belief, Plaintiff alleges that Defendants received Plaintiff's September 13, 1996 administrative appeal on September 16, 1996. Defendants have failed to make a final determination with respect to said appeal within the applicable time limit provisions of 5 U.S.C. § 552(a)(6)(A)(ii), and therefore, pursuant to 5 U.S.C. § 552(a)(6)(c), Plaintiff has exhausted its administrative remedies.

21. Plaintiff has no commercial purpose or interests, and will not profit from the information requested. Plaintiff directly and indirectly provides information and resources for several thousand persons interested in the water resources of the Klamath River basin. The information requested, if disclosed by Defendants, will be maintained in Plaintiff's library and made available to any member of the public. Thus, any persons desiring to review the requested information would be able to learn about and understand Defendants' activities.

22. Plaintiff has exhausted its administrative remedies as to each claim for relief asserted herein.



23. Plaintiff has employed attorneys to represent it in this action, and has incurred and will continue to incur expenses for attorneys' fees and costs herein.

FIRST CLAIM FOR RELIEF
(FOIA Violation - Injunction - Withheld Records)

24. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations of paragraphs 1 through 23 of this complaint.

25. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(3), Plaintiff has a right of access to all of the records requested in the aforementioned Freedom of Information Act requests. The requested records were and are identifiable records within the meaning of the Freedom of Information Act. Defendants' refusals to disclose the requested records were and are wrongful decisions without adequate legal basis, and Plaintiff is entitled to the relief provided by the Freedom of Information Act.

26. Unless Defendants are restrained and enjoined from their wrongful refusal to disclose the requested records, and are directed to disclose such records to Plaintiff, Plaintiff will be irreparably injured.

27. Plaintiff has no plain, speedy or adequate remedy at law.

SECOND CLAIM FOR RELIEF
(FOIA Violation - Injunction - Fee Waiver)

28. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations of paragraphs 1 through 27 of this complaint.

29. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii), and the DOI regulations 43 C.F.R. § 2.21(a)(1)(ii), Plaintiff was and is eligible for a waiver of fees related to Defendants' disclosure of the requested records. Defendants' refusals to waive the fees were and are wrongful decisions without adequate legal basis, and Plaintiff is entitled to the relief provided by the Freedom of Information Act.

30. Unless Defendants are restrained and enjoined from their wrongful refusal to grant Plaintiff's request for a waiver of fees, Plaintiff will be irreparably injured.

31. Plaintiff has no plain, speedy or adequate remedy at law.

THIRD CLAIM FOR RELIEF
(FOIA Violation - Judicial
Declaration - Withheld Records)

32. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations of paragraphs 1 through 31 of this complaint.

33. An actual controversy has arisen and now exists between Defendants and Plaintiff regarding the application of FOIA exemption 5 to each of the requested records that Defendants have withheld from disclosure. Plaintiff, therefore, desires a judicial declaration that the provisions of FOIA exemption 5 do not apply to any or all of the requested records that Defendants have withheld from disclosure.



FOURTH CLAIM FOR RELIEF
(FOIA Violation - Judicial
Declaration - Fee Waiver)

34. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations of paragraphs 1 through 33 of this complaint.

35. An actual controversy has arisen and now exists between Defendants and Plaintiff regarding the application of 5 U.S.C. § 552(a)(4)(A)(iii), and the DOI regulations 43 C.F.R. §§ 2.21(a)(1)(ii) and 2.20(b), in the context of Defendants' determinations as to Plaintiff's fee waiver requests. Plaintiff, therefore, desires a judicial declaration that Plaintiff's Freedom of Information Act requests meet the criteria for granting a fee waiver under the Freedom of Information Act and said DOI regulations, and that Defendants must grant Plaintiff's requested fee waivers.

FIFTH CLAIM FOR RELIEF
(APA Violation)

36. Plaintiff realleges and incorporates by reference, as if fully set forth herein, the allegations of paragraphs 1 through 35 of this complaint.

37. Defendants' refusal to disclose the requested records and waive the corresponding fees, and Defendants' determinations with respect to such actions, are arbitrary and capricious, not supported by evidence, and inconsistent with law.

38. Unless Defendants are restrained and enjoined from such arbitrary and capricious actions with respect to Plaintiff's Freedom of Information Act requests, Plaintiff will be irreparably injured.

39. Plaintiff has no plain, speedy or adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief as follows:

ON THE FIRST AND FIFTH CLAIMS FOR RELIEF:

1. For a temporary, preliminary, and permanent injunction prohibiting Defendants from withholding from Plaintiff the requested records referred to and described herein.

2. For a temporary, preliminary, and permanent injunction directing Defendants to disclose and make available to Plaintiff the requested records referred to and described herein.

ON THE SECOND AND FIFTH CLAIMS FOR RELIEF:

3. For a temporary, preliminary, and permanent injunction directing Defendants to grant the requested fee waivers related to Plaintiff's Freedom of Information Act requests.

ON THE THIRD CLAIM FOR RELIEF:

4. For a judicial declaration that the provisions of FOIA exemption 5 do not apply to any or all of the requested records that Defendants have withheld from disclosure, and that Defendants, therefore, have violated the Freedom of Information Act.



ON THE FOURTH CLAIM FOR RELIEF:

5. For a judicial declaration that Plaintiff's Freedom of Information Act requests meet the criteria for granting a fee waiver under the Freedom of Information Act and said DOI regulations, and that Defendants must grant Plaintiff's requested fee waivers.

ON ALL CLAIMS FOR RELIEF:

6. For reasonable attorneys' fees as provided for pursuant to applicable law including, but not limited to, 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412 *et seq.*

7. For costs of suit herein; and

8. For such other relief as the Court deems just and proper.

Dated: October 22, 1996

By /s/ RICHARD S. FAIRCLO
RICHARD S. FAIRCLO, OR Bar #75114
of Attorneys for Plaintiff

DE CUIR & SOMACH
A Professional Corporation

Dated: October 17, 1966
By /s/ ANDREW M. HITCHINGS
ANDREW M. HITCHINGS, CA
Bar #154554
of Attorneys for Plaintiff

DE CUIR & SOMACH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
400 CAPITOL MALL
SUITE 1900
SACRAMENTO, CA 95814-4407
TELEPHONE (916) 446-7979
FACSIMILE (916) 446-8199

February 27, 1996

Director, Office of Administration
Bureau of Indian Affairs
ATTN: FREEDOM OF INFORMATION
ACT REQUEST
U.S. Department of the Interior
Washington, D.C. 20240

Dear Freedom of Information Act Officer:

This is a Freedom of Information Act request.

As used in this request, the term "Klamath Basin Tribes" means each of the Klamath Tribes, the Hoopa Tribe, the Karuk Tribe, the Yurok Tribe, and their members, officers, agents, attorneys, consultants, employees, and any other person communicating on behalf of the listed Indian tribes.

Please provide me with any writing or communication provided to or received from the Klamath Basin Tribes, or any evidence or record of any communication, written or verbal, involving the Klamath Basin Tribes during the period January 15, 1996 through February 29, 1996. This includes, but is not limited to, any letter,



memorandum, facsimile transmission, meeting notes or notes of telephone conversation or any other conversation, meeting attendance lists, telephone logs, or any document of any kind, regardless of authorship, provided to or received from the Klamath Basin Tribes, or any other document that is evidence of a communication with the Klamath Basin Tribes.

Please notify me within ten days whether you will comply with this request. If any documents or record is not provided, please describe the document and FOIA exemption that you believe is applicable.

This request is on behalf of the Klamath Water Users Association. The Klamath Water Users Association is a tax-exempt corporation organized under section 501(c)(5) of the Internal Revenue Code and should thus be exempt from fees. If you determine that the request is not exempt from fees, then the fee category of "other requests" in 43 C.F.R. section 2.20(e) applies, and the fee schedule should be determined accordingly. Please advise me in advance if the cost for complying with this request would exceed $50.

Cordially yours,

/s/ PAUL S. SIMMONS
PAUL S. SIMMONS
Attorney

PSS/jlp

cc: David Zepponi

DE CUIR & SOMACH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
400 CAPITOL MALL
SUITE 1900
SACRAMENTO, CA 95814-4407
TELEPHONE (916) 446-7979
FACSIMILE (916) 446-8199

March 26, 1996

Kate Vandemoer
Office of the Assistant Secretary
Department of the Interior
1849 C Street, NW
M.S. 6640
Washington, DC 20240

Dear Dr. Vandemoer:

This is a Freedom of Information Act request.

As used in this request, the term "Klamath Basin Tribes" means each of the Klamath Tribes, the Hoopa Tribe, the Karuk Tribe, the Yurok Tribe, and their members, officers, agents, attorneys, consultants, employees, and any other person communicating on behalf of the listed Indian tribes.

Please provide me with any writing or communication provided to or received from the Klamath Basin Tribes, or any evidence or record of any communication, written or verbal, involving the Klamath Basin Tribes during the period January 15, 1996 through February 29, 1996. This includes, but is not limited to, any letter,



memorandum, facsimile transmission, meeting notes or notes of telephone conversation or any other conversation, meeting attendance lists, telephone logs, or any document of any kind, regardless of authorship, provided to or received from the Klamath Basin Tribes, or any other document that is evidence of a communication with the Klamath Basin Tribes.

Please notify me within ten days whether you will comply with this request. If any document or record is not provided, please describe the document and FOIA exemption that you believe is applicable.

This request is on behalf of the Klamath Water Users Association. The Klamath Water Users Association is a tax-exempt corporation organized under section 501(c)(5) of the Internal Revenue Code and should thus be exempt from fees. If you determine that the request is not exempt from fees, then the fee category of "other requests" in 43 C.F.R. section 2.20(e) applies, and the fee schedule should be determined accordingly. Please advise me in advance if the cost for complying with this request would exceed $50.

Cordially yours,

/s/ PAUL S. SIMMONS
PAUL S. SIMMONS
Attorney

PSS/jlp

cc: David Zepponi

DE CUIR & SOMACH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
400 CAPITOL MALL
SUITE 1900
SACRAMENTO, CA 95814-4407
TELEPHONE (916) 446-7979
FACSIMILE (916) 446-8199

March 26, 1996

Director, Office of Administration
Bureau of Indian Affairs
ATTN: FREEDOM OF INFORMATION
ACT OFFICER
U.S. Department of the Interior
Washington, D.C. 20240

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

This confirms the clarification of my enclosed FOIA letter which I have provided to Mr. Ross Mooney. The request concerns water resources issues in the Klamath River Basin in Oregon and California. As I mentioned, Dr. Vandemoer may be the person in Washington with the most knowledge of these issues. Mr. Mooney advised that it would be possible to obtain documents



that originate with her also. I wish to do so. I will also send a letter separately to her office. Thank you.

Cordially yours,

/s/ PAUL S. SIMMONS
PAUL S. SIMMONS
Attorney

PSS/jlp

Enclosures

cc: David Zepponi
Ross Mooney

DE CUIR & SOMACH
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
400 CAPITOL MALL
SUITE 1900
SACRAMENTO, CA 95814-4407
TELEPHONE (916) 446-7979
FACSIMILE (916) 446-8199

July 3, 1996

Director, Office of Administration
Bureau of Indian Affairs
ATTN: FREEDOM OF INFORMATION
ACT REQUEST
U.S. Department of the Interior
Washington, D.C. 20240

Dear Freedom of Information Act Officer:

This is a Freedom of Information Act request.

As used in this request, the term "Klamath Basin Tribes" means each of the Klamath Tribes, the Hoopa Tribe, the Karuk Tribe, the Yurok Tribe, and their members, officers, agents, attorneys, consultants, employees, and any other person communicating on behalf of the listed Indian tribes. This request concerns water resources on the Klamath River basin in Oregon and California.

Please provide me with any writing or communication provided to or received from the Klamath Basin Tribes, or any evidence or record of any communication, written or verbal, involving the Klamath Basin Tribes during the period January 1, 1996 through January 14,



1996, and the period March 1, 1996 through July 3, 1996. This includes, but is not limited to, any letter, memorandum, facsimile transmission, meeting notes or notes of telephone conversation or any other conversation, meeting attendance lists, telephone logs, or any document of any kind, regardless of authorship, provided to or received from the Klamath Basin Tribes, or any other document that is evidence of a communication with the Klamath Basin Tribes. This includes copies of communications from the Klamath Basin Tribes to persons or agencies other than your office.

It is not necessary to produce any of the following:

1. March 5, 1996 Letter from Susie Long, Yurok Tribe, to Interested Parties;

2. March 6, 1996 Letter from Richard Cross to Bruce Babbitt, Roger Patterson, Eluid Martinez, and Michael Ryan;

3. March 4, 1996 Report Prepared by Balance Hydrologics, Inc. Regarding Initial Assessment of Pre- and Post-Klamath Project Hydrology on the Klamath River and Impacts of the Project on Instream Flows and Fishery Habitat; and

4. March 1, 1996 Report Prepared by Trihey & Associates, Inc. Regarding Instream Flow Requirements for Tribal Trust Species in the Klamath River.

Please notify me within ten days whether you will comply with this request. If any document or record is

not provided, please describe the document and FOIA exemption that you believe is applicable.

This request is on behalf of the Klamath Water Users Association. The Klamath Water Users Association is a tax-exempt corporation organized under section 501(c)(5) of the Internal Revenue Code and should thus be exempt from fees. If you determine that the request is not exempt from fees, then the fee category of "other requests" in 43 C.F.R. section 2.20(e) applies, and the fee schedule should be determined accordingly. Please advise me in advance if the cost of complying with this request would exceed $50.

Cordially yours,

/s/ PAUL S. SIMMONS
PAUL S. SIMMONS
Attorney

PSS/jlp

cc: David Zepponi



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

---

Civil Action No. 96-3077-CO

KLAMATH WATERS USERS PROTECTIVE ASSOCIATION, PLAINTIFF

*v.*

THE UNITED STATES DEPARTMENT OF THE INTERIOR; THE UNITED STATES BUREAU OF INDIAN AFFAIRS, DEFENDANTS

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**DECLARATION OF SCOTT BERGSTROM**

I, Scott Bergstrom, state:

1. I am an Attorney-Advisor within the Office of the Solicitor, Division of Indian Affairs, Department of the Interior ("Department"), Washington, D.C.

2. In such capacity, I am one of the attorneys advising the Department in its development of a long-term operations plan for the Klamath Project. I specifically address issues relating to the interests and responsibilities of the Bureau of Indian Affairs and the Department's fulfillment of its trust responsibility to Indian tribes affected by operation of the Klamath Project. As a consequence of this role, I am also involved in the claim being prepared by the Bureau of Indian Affairs to be filed by the United States, as trustee, on behalf of the Klamath Tribes ("Tribes") in the on-going Klamath

Basin general stream adjudication ("adjudication") in Oregon.

3. All information herein is based upon my personal knowledge and upon information furnished to me in my official capacity.

4. I have also provided legal advice to the Bureau of Indian Affairs and the Office of the Assistant Secretary-Indian Affairs (collectively, "BIA") concerning the Freedom of Information Act ("FOIA") requests submitted to the BIA by the Klamath Water Users Protective Association ("Association").

5. The case at hand, in part, requests the disclosure under the FOIA of documents submitted to the Department by representatives of the Klamath Tribes. These documents discuss issues relating to the Department's trust responsibility to the Tribes in light of the development of a long-term operations plan for the Klamath Project and/or the presently on-going adjudication. The United States is a party to the adjudication, and it will file claims, as trustee, on behalf of the Tribes as well as for other federal interests. The development and adoption of a long-term operations plan for the Klamath Project must be consistent with the Department's trust responsibility to the Tribes in the adjudication. The creation and implementation of a long-term operations plan could result in the Department's facing legal challenges.

6. The United States and the Department have a trust responsibility to protect the rights and resources of the Indian tribes. The Supreme Court recognized this responsibility as early as 1831 in *Cherokee Nation*



*v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). It has long been the policy and practice of the Department to consult with tribes when those rights and resources are impacted by federal actions. This policy was recently reiterated and confirmed by Order of the Secretary of the Interior on November 8, 1993. A copy of this order is included as Exhibit A to this declaration. Further, the President, by memorandum dated April 29, 1994, directed that each federal agency consult with tribal governments prior to taking actions affecting Federally recognized tribal governments. A copy of this memorandum is included as Exhibit B to this declaration. The concepts of these executive memoranda have been incorporated into the Departmental Manual, and the Secretarial Order has subsequently expired of its own terms. A copy of the pertinent pages from the Departmental Manual is included as Exhibit C to this declaration. These concepts formed the basis of the Memorandum of Agreement for the Government-to-Government Relationship in the Development of the Klamath Project Operations Plan, signed by representatives of the Klamath Basin Tribes and the Department's agencies involved in operations plan development, including the BIA. A copy of this Memorandum of Agreement is included as Exhibit D to this declaration.

7. In connection with the development of water rights claims to be filed by the United States, as trustee, on behalf of the Tribes as well as the development of a long-term operations plan for the Klamath Project, the Department entered into on-going consultations, pursuant to the memoranda discussed in paragraph 6, with the Tribes to ensure that the Department would be fully informed of the Tribes' views and would have the Tribes' analysis available for its

decisionmaking. This consultation involved the discussion of legal analyses and theories regarding the scope of the water rights claims to be filed in the adjudication and the manner in which the Department's trust responsibility affects the operations of the Klamath Project. This consultation included the Tribes' analysis as to the legal theories which the Department may advance or encounter in support of the Tribes' interests in the adjudication, their analysis as to the Department's trust relationship with regard to operation of the Klamath Project, and their analysis regarding the interrelationship between the development of a long-term operations plan and the adjudication. Consultation continues as the Department seeks to fulfill its trust responsibility to represent adequately the Tribes' interest in the adjudication and the development of a long-term operations plan.

8. The United States and the Department have a common interest in protecting tribal rights and resources through the ongoing adjudication and the development of a long-term operations plan which is furthered by this consultation process.

9. Documents identified as FOIA document no. 3/96-168, dated January 19, 1996; FOIA document no. 17/96-168, dated February 16, 1996; FOIA document no. 18/96-168, also dated February 16, 1996; and FOIA document no. 19/96-168, dated February 23, 1996,[1] specifically involve and contain the Tribes' analysis as to matters relating to the adjudication and/or the development of a long-term operations plan. The documents

[1] More specific information about these documents is provided in the Vaughn index.



were prepared by the Tribes as a consequence of consultations with the Department seeking the Tribes' analysis for use by the Department in the performance of its official duties, *i.e.*, in Departmental deliberations concerning adjudication issues as well as its trust responsibility in developing a long-term operations plan. Receipt of these documents will assist the Department in its deliberations and ultimately in the decisionmaking regarding positions to take in the ongoing adjudication and the development of a long-term operations plan. The documents were produced by the Tribes and received by the Department prior to the Department's filing of water rights claims on behalf of the Tribes in the adjudication and prior to the development of a long-term operations plan for the Klamath Project.

10. The Department has used the above-described documents in its case preparation in connection with the adjudication and in addressing its trust responsibility in its development of a long-term operations plan for the Klamath Project.

11. The document identified as FOIA document no. 3/96-168 constitutes the response of Carl Ullman, an attorney for the Tribes, to a Solicitor's Office request for legal analysis discussing issues the Department may address in the adjudication and in operations plan development. This document was submitted to the Department prior to the Department's filing of claims on behalf of the Tribes in the adjudication, which are due to be filed April 30, 1997, and prior to the development of a long-term operations plan for the Klamath Project, currently scheduled to be completed in 1999.

12. The document identified as FOIA document no. 17/96-168 constitutes the response of Carl Ullman, an attorney for the Tribes, to a Solicitor's Office request for legal analysis addressing the issues related both to the adjudication and the development of a long-term operations plan. This document was submitted to the Department prior to the Department's filing of claims on behalf of the Tribes in the adjudication, which are due to be filed April 30, 1997, and prior to the development of a long-term operations plan for the Klamath Project, currently scheduled to be completed in 1999.

13. The document identified as FOIA document no. 18/96-168 is identical to FOIA document no. 17/96-168. This document was submitted to the Department prior to the Department's filing of claims on behalf of the Tribes in the adjudication, which are due to be filed April 30, 1997, and prior to the development of a long-term operations plan for the Klamath Project, currently scheduled to be completed in 1999.

14. The document identified as FOIA document no. 19/96-168 constitutes the response of Carl Ullman, an attorney for the Tribes, to a Solicitor's Office request for legal analysis addressing the issues related both to the adjudication and the development of a long-term operations plan. Although this document is signed by Elwood Miller, Jr., Director of the Klamath Tribes' Department of Natural Resources, I understand that Mr. Ullman is the author. This document was submitted to the Department prior to the Department's filing of claims on behalf of the Tribes in the adjudication, which are due to be filed April 30, 1997, and prior to the development of a long-term operations plan for the Klamath Project, currently scheduled to be completed in 1999.



15. Documents identified as FOIA document no. 3/96-168, FOIA document no. 17/96-168, FOIA document no. 18/96-168, and FOIA document no. 19/96-168 were prepared by tribal attorney Carl Ullman as part of the consultation process between the Department and the Tribes and in response to the Department's request for the Tribes' analysis. These documents were prepared to assist the Department in the development of water rights claims to be filed on behalf of the Tribes in the adjudication as well as the development of a long-term operations plan for the Klamath Project. They were created for use by Departmental attorneys and staff in the performance of their official duties, *i.e.*, in the deliberations and preparations of the Department's and/or the United States' position in current and potential future litigation as well as for the continuing development of a long-term operations plan for the Klamath Project.

In accordance with 28 U.S.C. § 1746 I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 5, 1997

/s/ SCOTT BERGSTROM
SCOTT BERGSTROM
Attorney-Advisor
Office of the Solicitor

INDEX

Klamath Water Users Protective Assocation v. United States Department of the Interior; United States Bureau of Indian Affairs, Civil Action No. 96-3077-CO

Following is a detailed description of each withheld document and accompanying justification for asserting FOIA exemption (5).

* * * * *

b. Correspondence Between Interior Personnel and Klamath Basin Tribes Representatives or Organizations

1. FOIA document number: 3/96-168
   Type of document: Position Paper
   Subject: Untitled—discusses water law
   To: Sent to Cathy Wilson (BIA); also sent to Office of the Solicitor, Division of Indian Affairs
   From: Klamath Tribes Department of Natural Resources
   Date: January 19, 1996
   Description: Seven page position discussing legal theories concerning the water rights of the federally recognized Indian tribes of Klamath Basis [sic]
   Exemption(s) claimed: (b)(5)
   Basis for withholding: Attorney work-product and deliberative process privileges. This document satisfies the "intra-agency" requirement for invoking exemption (5) because (a) the Department consults with the Klamath Tribes when Departmental actions may affect tribal resources pursuant to the



Department's trust obligation and (b) the Department has relied upon the document in its deliberations. The Office of the Solicitor asked Bud Ullman, an attorney for the Klamath Tribes, to develop this position paper. This document is attorney work product because it is prepared by an attorney and has been shared with the Department because of the common interest in protecting tribal trust resources in the development of an operations plan for the Klamath Project, in potential litigation arising from the operations plan development, and in the pending adjudication in Oregon. This document is predecisional because it predates both (a) the filing of the water rights claims on behalf of the Klamath Tribes in the Klamath Basin Adjudication, which are due to be filed April 30, 1997, and (b) the issuance of an operations plan for the Klamath Project. This document is also deliberative in nature because it actually addresses issues related to the development of an operations plan for the Klamath Project and the pending adjudication. Disclosure of the document would expose the Department's decision-making process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to address water rights issues concerning the tribes.

2. FOIA document number: 6/96-168
   Type of document: Memorandum
   Subject: Department of Interior Responsibility to the Trust Asset (Fish in the Upper and Lower Klamath Basin)
   To: Tom Strekal (BIA), Doug Tedrick (BIA), Richard Cross (attorney for Yurok Tribe), and Bud Ullman (attorney for Klamath Tribes)

From: Cathy Wilson (BIA)
Date: January 24, 1996
Description: One page memorandum. The memorandum contains views on policy the BIA could provide to other governmental agencies concerning the obligation to protect Indian trust assets in developing an operations plan for the Klamath Project. Specifically, the memorandum considers proposing language as guidance regarding the trust responsibility.
Exemption(s) claimed: (b)(5)
Basis for withholding: Deliberative process privilege. This document satisfies the "intra-agency" threshold requirement for invoking exemption (5) because (a) the Department consults with the Klamath Basin Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. The recipients of this memorandum were BIA Klamath team members and tribal attorneys who worked on this project under the terms of the Government-to-Government Memorandum of Agreement. *See* Memorandum of Agreement for Government-to-Government Relationship in the Development of the Klamath Projects Operations Plan, November 1995. This memorandum is predecisional because it predates the issuance of an operations plan. This memorandum is also deliberative in nature [*sic*] because it actually addresses issues related to the development of an operations plan for the Klamath Project. Disclosure of the memorandum would expose the Department's decisionmaking process in such a way as to discourage candid discussion within



the Department and thereby undermine the Department's ability to develop an operations plan.

* * * * *

4. FOIA document number: 10/96-168
Type of document: Position Paper
Subject: Comments on USFWS Proposals for Listed Species
To: Tom Strekal (BIA)
From: Bud Ullman (attorney for Klamath Tribe)
Date: February 8, 1996
Description: Five page position paper with facsimile transmittal sheet. On December 3, 1996, the Department released the facsimile transmittal sheet accompanying this document. The paper expresses views concerning trust resources in light of the Fish and Wildlife Service's proposal regarding listed species and the resulting implications on lake management.
Exemption(s) claimed: (b)(5)
Basis for withholding: Deliberative process privilege. This document satisfies the "intra- agency" threshold requirement for invoking exemption (5) because (a) the Department consults with the Klamath Basin Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. This document is predecisional because it predates the issuance of an operations plan. This document is also deliberative in nature because it actually addresses issues related to the development of an operations plan for the Klamath Project. Disclosure of the document would expose the Department's

decisionmaking process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to develop an operations plan.

* * * * *

13. FOIA document number: 16/96-201
Type of document: Letter
Subject: Klamath Tribes's water rights in the Klamath Basin Adjudication
To: Lynn Peterson (Regional Solicitor)
From: Bud Ullman (attorney for Klamath Tribes)
Date: May 23, 1996
Description: Three page letter discussing the Klamath Basin Adjudication. This letter concerns the water rights claims being prepared on behalf of the Klamath Tribes.
Exemption(s) claimed: (b)(5)
Basis for withholding: Attorney work product and deliberative process privileges. This document satisfies the "intra-agency" requirement for invoking exemption (5) because (a) the Department consults with the Klamath Basin Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. The Office of the Solicitor asked Bud Ullman, an attorney for the Klamath Tribes, to develop this letter. This document is attorney work product because it is prepared by an attorney and has been shared with the Department because of the common interest in protecting tribal trust resources in the pending adjudication in Oregon. This document is predecisional because it predates the filing



of the water rights claims on behalf of the Klamath Tribes in the Klamath Basin Adjudication, which are due to be filed April 30, 1997. This document is also deliberative in nature because it actually addresses issues related to the pending adjudication which involves tribal water rights to be filed. Disclosure of the document would expose the Department's decisionmaking process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to address water rights issues concerning the tribes. Disclosure would expose sensitive litigation positions to be taken in the adjudication.

* * * * *

16. FOIA document number: 20/96-201
Type of document: Letter
Subject: Klamath Tribes's water rights
To: Stan Speaks (BIA)
From: Jeff Mitchell (Klamath Tribes)
Date: June 18, 1996
Description: One page letter with attachment. Letter references the attachment and highlights the issues therein. Attachment is the three page 5/23/96 letter from Bud Ullman (attorney for Klamath Tribes) to Lynn Peterson (Regional Solicitor) discussing the Klamath Basin Adjudication (identified by FOIA document number 16/96-201). See analysis above regarding the rationale for withholding the attachment.
Exemption(s) claimed: (b)(5)
Basis for withholding: Deliberative process privilege. This document satisfies the "intra-agency" requirement for invoking exemption (5) because (a)

the Department consults with the Klamath Basin Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. This document is predecisional because it predates the filing of claims on behalf of the Klamath Tribe in the pending Oregon adjudication. This document is also deliberative in nature because it actually addresses issues related to the water rights claims to be filed in the adjudication. Disclosure of the document would expose the Department's decisionmaking process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to address the water rights of the tribes. Disclosure would expose sensitive litigation positions to be taken in the adjudication.

17. FOIA document number: 25/96-201
Type of document: Letter
Subject: Klamath Tribal Executive Committee Resolution
To: Stan Speaks (BIA)
From: Bud Ullman (attorney for Klamath Tribes)
Date: June 28, 1996
Description: One page letter with two page attachment. Letter references the attachment and highlights the issues therein. Attachment is the Klamath Tribes's resolution regarding the Tribes's water rights claims in the Klamath Basin Adjudication.
Exemption(s) claimed: (b)(5)
Basis for withholding: Deliberative process privilege. This document satisfies the "intra-agency" requirement for invoking exemption (5) because (a) the Department consults with the Klamath Basin



Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. This document is predecisional because it predates the filing of claims on behalf of the Klamath Tribe in the pending Oregon adjudication. This document is also deliberative in nature because it actually addresses issues related to the water rights claims to be filed in the adjudication. Disclosure of the document would expose the Department's decisionmaking process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to address the water rights of the tribes. Disclosure would expose sensitive litigation positions to be taken in the adjudication.

* * * * *

19. FOIA document number: 27/96-201
Type of document: Internal memorandum
Subject: Untitled—discusses endangered suckers
To: Cathy Wilson (BIA)
From: Jacob Kahn (Klamath Tribes)
Date: July 1, 1996
Description: Two page memorandum, nine pages of graphs, and a facsimile transmittal sheet. The memorandum concerns biological factors affecting trust resources. On December 27, 1996, the Department released the facsimile transmittal sheet accompanying this document.
Exemption(s) claimed: (b)(5)
Basis for withholding: Deliberative process privilege. This document satisfies the "intra-agency" requirement for invoking exemption (5) because (a)

the Department consults with the Klamath Basin Tribes when Departmental actions may affect tribal resources pursuant to the Department's trust obligation and (b) the Department has relied upon the memorandum in its deliberations. This document is predecisional because it predates the issuance of an operations plan. This document is also deliberative in nature because it actually addresses issues related to the development of an operations plan for the Klamath Project. Disclosure of the document would expose the Department's decisionmaking process in such a way as to discourage candid discussion within the Department and thereby undermine the Department's ability to develop an operations plan. Disclosure would expose technical opinions deemed critical to analyzing the extent of the Department's trust responsibility.



THE WHITE HOUSE

Office of the Press Secretary

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For Immediate Release April 29, 1994

April 29, 1994

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Government-to-Government Relations with Native American Tribal Governments

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native

American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

(a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.

(b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

(c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.

(d) Each executive department and agency shall take appropriate steps to receive any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.



(e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.

(f) Each executive department and agency shall apply the requirements of Executive Order Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the *Federal Register*.

WILLIAM J. CLINTON

[seal omitted]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

ORDER NO. 3175

Subject: Departmental Responsibilities for Indian Trust Resources

Sec. 1 Purpose. This Order clarifies the responsibility of the component bureaus and offices of the Department of the Interior to ensure that the trust resources of federally recognized Indian tribes and their members that may be affected by the activities of these bureaus and offices are identified, conserved and protected. It is the intent of this Order that each bureau and office will operate within a government to government relationship with federally recognized Indian tribes and that the Bureau of Indian Affairs provide timely and accurate information upon the request of their Interior Department counterparts.

This Order is for internal management guidance only, and shall not be construed to grant or vest any right to any party in respect to any Federal action not otherwise granted or vested by existing law or regulations.

Sec. 2 Authority. This Order is issued under the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262).



Sec. 3 Responsibility. The heads of bureaus and offices are responsible for being aware of the impact of their plans, projects, programs or activities on Indian trust resources. Bureaus and offices when engaged in the planning of any proposed project or action will ensure that any anticipated effects on Indian trust resources are explicitly addressed in the planning, decision and operational documents; i.e., Environmental Assessments, Environmental Impact Statements, Management Plans, etc., that are prepared for the project. These documents should clearly state the rationale for the recommended decision and explain how the decision will be consistent with the Department's trust responsibilities. Bureaus and offices are required to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may affect, the appropriate office of the Bureau of Indian Affairs, and the Office of the Solicitor (for legal assistance) if their evaluation reveals any impacts on Indian trust resources. All consultations with tribal governments are to be open and candid so that all interested parties may evaluate for themselves the potential impact of the proposal on trust resources.

The heads of the Department's bureaus and offices will prepare and publish procedures and directives prior to the expiration of this Order to ensure that their respective units are fully aware of this Order and that they are in compliance with the intent of the Order. Prior to final issuance, the Office of American Indian Trust will review and comment on these procedures before their approval by the Assistant Secretary—Indian Affairs.

Sec. 4. Effective Date. This Order is effective immediately. Its provisions will remain in effect until October 1, 1994, or until it is amended, superseded, or revoked, whichever occurs first.

/s/ BRUCE BABBITT
Secretary of the Interior

Date: NOV 8, 1993



**DEPARTMENT OF THE INTERIOR**
**DEPARTMENTAL MANUAL**

**Part 512 American Indian and Alaska Native Programs**

**Intergovernmental Relations**

**Chapter 2 Departmental Responsibilities for Indian Trust Resources 512 DM 2.1**

2.1 Purpose. This Chapter establishes the policies, responsibilities, and procedures for operating on a government-to-government basis with federally recognized Indian tribes for the identification, conservation, and protection of American Indian and Alaska Native trust resources to ensure the fulfillment of the Federal Indian Trust Responsibility.

2.2 Policy. It is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety.

2.3 Responsibilities.

A. Heads of bureaus and offices are responsible for identifying any impact of Departmental plans, projects, programs or activities on Indian trust resources. Department officials shall:

(1) Establish procedures to ensure that the activities of Departmental organizations impacting upon Indian trust resources are explicitly addressed in planning, decision, and operational documents;

(2) Ensure that bureaus and offices consult with the recognized tribal government whose trust resource, asset, or health and safety is potentially affected by the proposed action, plan, or activity;

(3) Remove procedural impediments to working directly and effectively with tribal governments;

(4) Provide drafts of all procedures or amendments to procedures developed pursuant to this Chapter to the Office of American Indian Trust for review and comment; and,

(5) Designate a senior staff member to serve as liaison between the bureau or office and the Office of American Indian Trust.

B. Office of American Indian Trust is responsible for ensuring compliance with the procedures and requirements under this Chapter. The Office of American Indian Trust will serve as the Department's liaison and initial point of contact on all matters arising under this Chapter. All procedures and amendments to procedures shall be submitted by Departmental bureaus and offices to the Office of American Indian Trust for review and comment. After such review and comment, the procedures and amendments to procedures will be transmitted to the Assistant Secretary - Indian Affairs for final approval.



C. Assistant Secretary - Indian Affairs is responsible for approving bureau and office procedures, or amendments thereto, developed pursuant to this Chapter.

2.4 Procedures.

A. Reports. As part of the planning process, each bureau and office must identify any potential effects on Indian trust resources. Any effect must be explicitly addressed in the planning/decision documents, including, but not limited to, Environmental Assessments, Environmental Impact Statements, and/or Management plans prepared for the project or activity. The documentation shall:

(1) Clearly state the rationale for the recommended decision; and

(2) Explain how the decision will be consistent with the Department's trust responsibility.

B. Consultation. In the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s), the appropriate office(s) of the Bureau of Indian Affairs, the Office of the Solicitor, and the Office of American Indian Trust. Each bureau and office within the Department shall be open and candid with tribal government(s) during consultations so that the affected tribe(s) may fully evaluate the potential impact of the proposal on trust resources and the affected bureau(s) or office(s), as trustee, may fully incorporate tribal views in its decision-making processes. These consultations, whether initiated by the tribe or the

Department, shall be respectful of tribal sovereignty. Information received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s).



## MEMORANDUM OF AGREEMENT FOR THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP IN THE DEVELOPMENT OF THE KLAMATH PROJECT OPERATIONS PLAN

This memorandum of Agreement (Agreement) provides a guide for the implementation of the government-to-government relationship between the United States, acting through the Bureau of Reclamation (Reclamation), in coordination with the Fish and Wildlife Service, National Marine Fisheries Service, and the Bureau of Indian Affairs (these four will hereinafter be referred to, separately and together, as the United States), and the Klamath, Yurok, Hoopa, and Karuk Tribes (Klamath Basin Tribes or Tribes), with respect to the development of the long-term operations plan, the Klamath Project Operations Plan (KPOP), for Reclamation's Klamath Project. Several meetings have been conducted between the Tribes and the United Sates with regard to the KPOP. These meetings have served to clarify the proposed structure of the government-to-government relationship.

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. The elements of this unique relationship include: (a) recognition of the rights of tribes as sovereign entities; (b) recognition of the right of tribes to delegate representation; (c) consultation with tribal governments prior to taking actions that affect tribal governments, rights, or trust resources; and (d) participation by tribes in planning and managing the trust resource base. Recent expressions of the relationship between the United States

Government and Native American tribal governments are found in President Clinton's Memorandum of April 29, 1994, and Order No. 3175 of the Secretary of the Interior issued November 8, 1993. These documents are attached as Exhibit A and B, respectively.

(A) Tribes as Sovereigns

The President's Memorandum and the Secretarial Order recognize the sovereign nature of tribal governments and are intended to ensure that the rights of sovereign tribal governments are fully respected.

A memorandum prepared by the Regional Solicitor, Pacific Southwest Region, of the Department of the Interior, dated July 25, 1995, provides the legal framework developed by the Regional Solicitor for the guidance of the United States regarding the Tribal water rights, among others, that may be affected by development of the KPOP and Project operations. The Regional Solicitor's memorandum describes certain rights of the Tribes, including water and fishing rights recognized by treaty, statute, executive order and case law, and sets out the relative priority of the Tribes' water rights. The Regional Solicitor's memorandum is attached as Exhibit C.

With respect to the development of the KPOP, the government-to-government relationship involves the following:

1. Identification of Tribal water rights and hunting, fishing and gathering rights that may be affected by Project operations.



2. Assessment, in consultation with the Tribes, of the impacts of the KPOP on Tribal trust resources and species of concern under the Endangered Species Act, and assurance that Tribal governments' rights and concerns are considered during the development of the KPOP.

3. Direct and effective communications with the Tribal governments and their authorized representatives in developing and completing the KPOP.

(B) Tribal Delegation of Authority

The Tribes have delegated certain responsibilities to the Klamath River Inter-Tribal Fish and Water commission (the "KRITFWC"), which is an inter-tribal resources management entity comprised of representatives of each of the Tribes. The United States will communicate and coordinate with the KRITFWC and the Tribes. Communications will be directed to those listed on Attachment D.

(C) Consultation

Consistent with the responsibilities of Federal agencies to respect the government-to-government relationship with tribal governments, in developing the KPOP, the United States will consult with the Klamath Basin Tribes prior to taking actions that affect these Tribal governments, and will consider the comments and concerns of the Tribes in a timely and meaningful way, before decisions are made.

A consultant has been hired to conduct the bulk of the technical work related to developing the KPOP. The consultant will communicate with the Tribes and their representatives, seek data and other information

from the Tribes, and include the comments and programs of the Tribes in its analysis related to the KPOP. The United States will consider the data and information submitted by the Tribes and will either incorporate the data and information, or provide reasons for not doing so.

Consultation with respect to the development of the KPOP will take the following form:

1. The United States, together with the consultant, will meet with the Tribes and provide copies of working documents for tribal review and comment to further the government-to-government relationship.

2. The United States will communicate on a monthly or more frequent basis with the designated representative(s) of each Tribe. Written communications and reports shall be sent to the representatives of the Tribes and the United States, as identified in Attachment O.

(D) Tribal Management and Participation in the KPOP Process

Water resources management involves extensive decision making. Building Tribal participation into agency planning and decision making is a necessary, foundational component of the government-to-government relationship and future decision making, as it is essential to incorporate the perspective that only the Tribes can provide regarding the impact of management decisions on Tribes and their resources.

The KPOP is being developed and will be adopted by Reclamation as a means of managing water resources



within its authority related to the Klamath Project. The Tribes have responsibility for the management of trust resources within their authority. Tribal involvement in the development of the KPOP is an important component of the government-to-government relationship. This involvement of the Tribes is a major means of assuring that the development of the KPOP reflects the United States' trust obligation and Tribal rights.

With respect to the KPOP, Tribal involvement will include the following:

1. Reclamation and the Tribes will, to the maximum extent practicable, coordinate their resource management activities as they affect one another.

2. Tribal involvement will include but not be limited to conducting scientific research and data collection regarding stream flows, like [sic] levels, water quality, fish populations, water needs and supply forecasts, and evaluating the assessing overall river and lake operations.

3. The Tribes will provide data and input to Reclamation in a timely fashion for development of the KPOP.

4. The Tribes will be involved in the technical evaluation of the data used, collected and analyzed, and technical conclusions drawn from such data.

5. The Tribes will participate with the United States regarding management decisions and actions implementing the KPOP that affect Tribal trust resources. The United States will seek Tribal involvement at the

earliest time to assure an opportunity for the Tribes to provide input regarding data collection, analysis and management decisions. In developing and implementing the KPOP, Reclamation, consistent with its trust responsibility, will protect Tribal rights, including the Tribes' water rights and rights to other trust resources.

(E) Effect of Agreement

This agreement is to provide for the effective implementation of the government-to-government relationship between the parties, and is in furtherance of the responsibility of the United States to protect Tribal trust resources. It does not by itself create, change, or alter any rights of any of the parties to the Agreement, nor by itself does it create an independent right subject to judicial review. Nothing in this Agreement is intended to or shall have the effect of constraining or limiting the United States in carrying out its obligations under law, including its trust obligations. All communications under this Agreement are in furtherance of federal responsibilities.

Nothing in this Agreement is intended to or shall apply to the relations of the parties in connection with the Klamath Basin Water Rights Adjudication pending before the State of Oregon.

This Agreement may be modified or amended upon the mutual consent of the parties.



This Agreement may be executed in counterparts.

Bureau of Reclamation
By: /s/ [illegible] Patterson
Title: Regional Director
Mid-Pacific Region
Date: 11/17/95

Klamath Tribe
By: /s/ [signature illegible]
Title: _____
Date: 11/15/95

Fish and Wildlife Service
By: /s/ [signature illegible]
Title: Reg. Dir.
Date: 11/20/95

Hoopa Valley Tribe
By: /s/ Fred [illegible]
Title: Vice Chair
Date: 11/15/95

Bureau of Indian Affairs
Sacramento Area Office
By: /s/ [signature illegible]
Title: Area Director
Date: 11/16/95

Karuk Tribe

By: /s/ Barry "Skip" [illegible]
Title: Vice-Chairman
Date: 11/15/95

Bureau of Indian Affairs
Portland Area Office
By: /s/ Edmond G. Payne
Title: Acting Area Dir.
Date: 11/21/95

Yurok Tribe

By: /s/ Maria Jupp
Title: Vice-Chair
Date: 11/15/95

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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Civil No. 96-3077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF INDIAN AFFAIRS, DEFENDANTS

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DECLARATION OF DAVID A. SOLEM

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I, David A. Solem, declare:

1. I am the Manager of the Klamath Irrigation District (KID). I have held this position since 1983. KID is a party to a contract with the United States Bureau of Reclamation (Reclamation) providing for delivery of irrigation water through facilities constructed as part of the Klamath Project. I am also KID's representative on the Board of Directors of the Klamath Water Users Association (Association). I am also the President of the Association. I have held this position for four months. Prior to being elected the President of the Association, I was its Vice President for a approximately five years.

2. The Association is non-profit corporation formed under section 501(c)(5) of the Internal Revenue Code.



Most of the members of the Association are contractors of Reclamation and receive water for irrigation through Klamath Project facilities. Of these, most are public agencies, primarily irrigation districts.

The current members of the Association distribute water to nearly 230,000 acres of land for irrigation in southern Klamath County, Oregon, and northern Modoc and Siskiyou Counties in California. With few exceptions, this land is irrigated and farmed by private individuals or firms. The total value of agricultural products produced by the Klamath Project has been estimated at $120 million annually. In addition to the families directly supported by agriculture, numerous businesses provide goods and services to farmers. Agriculture supports a significant portion of the local tax base.

3. I have personal knowledge of the operations of the Klamath Project since 1982. The major source of water for irrigation in the Klamath Project area is Upper Klamath Lake. Water is both stored in the lake by operation of a dam, and also diverted from the lake through a large canal (A Canal) operated by KID. In addition, some water released from the dam is diverted for project irrigation at locations just below the dam. Other water released from the dam flows into the Klamath River and eventually to California and into the Pacific Ocean.

In the past few years, Reclamation and Interior have stated that water in the Klamath Project must be managed, allocated, or reallocated to protect interests of various Indian tribes. I do not recall the Interior agencies taking this position or taking any action in this regard prior to about 1992. Since 1994, the tribes' is-

sues have become more prominent. In the late summer of 1994, a drought year, Reclamation personnel advised me that additional water would be released from Link River Dam to provide Klamath River flows at the demand of the tribes downstream. On behalf of KID, I objected to this proposed action. However, the additional water was released, resulting in shortages and injury for some irrigators.

4. In February of 1995, Reclamation announced that it planned to prepare a plan for long-term operation of the Klamath Project. The purpose of the plan was to be to develop a plan to operate the Klamath Project according to the various legal obligations of Interior, and in different types of years (for example, "wet" or "dry"). Reclamation stated that this Klamath Project Operation Plan (KPOP) would be completed by March of 1996, in time to guide project operations for 1996 and subsequent years. In the meantime, Reclamation prepared a one-year operating plan for 1995, after circulating a draft for public comment.

5. In general, the process for developing the KPOP included obtaining input from all interested parties. The approach was to be that the legal obligations of Reclamation would first be clearly defined. Then, technical issues such as the water "needs" of agriculture or biological resources would be analyzed. The alternatives for operating the project in light of the legal and technical issues would then be studied, leading to a decision.

6. The Interior agencies created a series of meetings to discuss KPOP development, to which all interested parties were invited. I attended nearly all of these meeting [*sic*].



7. Interior hired a consultant, CH2M Hill, to assist in KPOP development. CH2M Hill prepared a number of technical papers based on its analysis. All interested parties were given an opportunity to comment on the draft technical memos. Reclamation also engaged the U.S. Geological Survey to review technical information and arguments that had been submitted by various parties, primarily those of the Klamath Tribe and its consultants.

8. Reclamation and other Interior personnel from all participating agencies repeatedly assured me that the KPOP development would be an open, public process in which no interest would receive special or preferred treatment.

9. Numerous Interior agency personnel attended the KPOP meetings, including employees of Reclamation, the U.S. Fish and Wildlife Service, and the Bureau of Indian Affairs. Frequently, meetings were attended even by representatives of the Office of the Secretary. Tribal representatives and their attorneys and consultants also attended. The meetings were also attended by representatives of environmental groups and state agencies. At the meetings, tribes and environmental groups advocated decisions for management of water that would reallocate water used in the Klamath Project to instream uses. The Yurok, Hoopa, and Karuk Tribes advocated high flows in the mainstem of the Klamath River. The Klamath Tribe advocated maintaining high lake elevations in Upper Klamath Lake. Many of these proposals would have been very detrimental to irrigation interests.

Usually, on the occasion of KPOP meetings, some Interior representatives would also meet separately

with Klamath Project irrigation interests. I attended these meetings. I was aware that the Interior representatives also would have separate meetings with the tribes, which were called "government to government" meetings.

Many irrigation representatives were frustrated and angered by the KPOP process. I have heard many people express this frustration to Interior personnel. I and others believed that Interior had not answered several basic questions about its legal authority to proceed in the manner it was proceeding. I and others also expressed concern that the KPOP meetings had become primarily a forum for advocacy of reallocating water away from the Klamath Project. Nonetheless, we agreed to participate in the process through its completion.

10. Throughout the KPOP process, we were informed that the Klamath Project Manager, Mike Ryan, a Reclamation employee, had ultimate authority as to the contents of the final KPOP. We were informed that the other Interior agencies would review and comment on a proposed plan prepared by Mr. Ryan before a draft was released to the public, but that ultimately the plan would be Mr. Ryan's plan. The deadline for issuing a final plan was March 15, 1996, and a draft plan would be issued for public comment by mid-February of 1996. We were advised that Mr. Ryan would prepare a plan for internal review in Interior and then a public draft would be released. We were told that neither irrigators, tribes, nor other persons outside of the federal government would have an opportunity to review the plan before a draft plan was released publicly.



11. I discussed the status of the KPOP with Mr. Ryan during February of 1996. At one point, Mr. Ryan informed me that, with the assistance of CH2M Hill, he completed a draft plan for internal review by Interior personnel. He also told me that the plan was circulated within Interior for review. He also told me that, after receiving comments from within Interior, he completed a plan for release for public review. There was no draft KPOP released to the public in 1996 or at any other time.

12. I was concerned that the draft plan had been shared with tribes despite the representations of Interior that this would not occur, and that objections of the tribes had led to the "vetoing" of the plan. I specifically asked Mr. Ryan if the draft plan he had prepared had been reviewed by the tribes in the Klamath Basin. He assured me that it did not. I also heard other persons question Interior personnel regarding whether the internal plan had been provided to the tribes. On each occasion, the Interior personnel stated that it had not. The persons who made this statement included Roger K. Patterson, Regional Director, Mid-Pacific Region, U.S. Bureau of Reclamation; Les Ramirez, Special Assistant to the Secretary, Office of the Secretary of the Interior; and David Cottingham, Department of the Interior.

13. Since the decision by Reclamation or Interior not to release a plan in 1996, water allocation issues have remained very contentious. Reclamation employees have generally stated that they now hope to prepare a long-term plan by sometime in 1999. No specific schedule or completion date has been identified. I am aware of no written schedule for this work. Reclama-

tion personnel, including Mr. Patterson, have expressed skepticism in my presence as to when a long-term plan might actually be completed. A one-year plan called an advisory was released in 1996. There is no plan of any kind for 1997.

14. I am familiar with reports prepared for the Yurok Tribe or its attorneys by the consulting firms of Balance Hydrologics and Trihey and Associates. I was present at a KPOP meeting in February or March of 1996 when an attorney for the Yurok Tribe stated that if Reclamation did not adopt the recommendations of the report, the attorney would have a court impose those requirements, or words to that effect.

15. In all, the Association has about 20 irrigation districts, improvement districts and other public agency members. Membership in the Association is voluntary. Each year, each member determines whether it will pay an assessment to the Association and participate in its activities. The Association has no other source of revenue, other than occasional donations or revenues from fundraising events. The Association currently has one employee, whose functions are primarily administrative. The Association formally employed an executive director.

The Association does not conduct any commercial activities. The Association does not use or distribute water from the Klamath Project or have a contract to receive water through Klamath Project facilities.

16. Some of the Association members are not contractors within the Klamath Project.



17. The Association provides information and representation for its members on matters in which they have common interest, and to persons in the Klamath Basin generally. The Association annually holds a meeting at which is presented information regarding the activities of the Association and current developments regarding water resources issues in the Klamath River Basin. The Association maintains a library of materials related to water resources, agriculture, and other resources issues in or affecting the Klamath Basin. The Association also makes information available to the public by participation in public or civic functions such as booths at county fairs.

18. The Association has for several years been active in environmental or ecosystem restoration efforts in the Klamath River Basin. In 1992, the Association prepared and published the *Initial Ecosystem Restoration Plan for the Upper Klamath River Basin.* The Association has also provided support, funding, and implementation services for ecosystem restoration projects in the Klamath Basin, such as fencing of streams and marsh and riparian restoration projects.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 11th day of April 1997 at Klamath Falls, Oregon.

/s/ DAVID A. SOLEM
DAVID A. SOLEM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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Civil No. 96-3077-CO

KLAMATH WATER USERS PROTECTIVE ASSOCIATION, PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES BUREAU OF INDIAN AFFAIRS, DEFENDANTS

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DECLARATION OF PAUL S. SIMMONS

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I, Paul S. Simmons, declare:

1. I am an attorney and shareholder in the law firm of De Cuir & Somach. I am admitted to practice law in the States of California and New York and in the U.S. Court of Appeals for the Ninth Circuit. I have been admitted pro hac vice to practice before this Court in this litigation. My firm represents the Klamath Water Users Association (Association).

2. In late January of 1995, I learned that officials from the Department of the Interior (Interior) had scheduled meetings in Berkeley, California with members of certain environmental groups and Indian tribes. I also learned that these meetings were to involve water resources in the Klamath River Basin and the demands of environmental groups and tribes that water



used in the Klamath Project be allocated to instream use. In early February, I sent Freedom of Information Act (FOIA) requests to various Interior agencies, including the Office of the Regional Solicitor, Pacific Southwest Region, requesting information related to those meetings. Exhibit A is a true and correct copy of the response with enclosures received from David Nawi, Office of the Solicitor, Pacific Southwest Region, to Paul Simmons, De Cuir & Somach, dated March 10, 1995, regarding Freedom of Information Act Request.

3. I have observed the Klamath Project Operation Plan (KPOP) process described by David Solem in his declaration. I attended a few of the KPOP meetings, and have spoken on numerous occasions with personnel from all agencies in Interior who are involved in the recently-developed process for developing plans for Klamath Project operations.

4. I have sent numerous requests to Interior agencies under FOIA for communications between such agencies and Klamath Basin tribes and other groups. I have received numerous documents in response. In addition, documents have been provided to my clients and me on verbal request. The following documents received from Interior include the following:

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| Exhibit B | Memorandum from James K. Bryant, Bureau of Reclamation, to Files, dated September 26, 1994, regarding Meeting with Native American Tribes Concerning the Operation of Upper Klamath Lake and the Klamath River System on September 22, 1994 |

Exhibit C — Letter from Marvin Garcia, The Klamath Tribe, to Hon. Bruce Babbitt, Secretary of the Interior, dated December 27, 1994, regarding Reinitiation of Formal Consultation Pursuant to Endangered Species Act § 7 and Operation of the Klamath Irrigation Project; 60-Day Notice of Violation and Intent to Sue

Exhibit D — Letter from Joseph C. Polos, Yurok Tribe Fisheries Program, to Mike Ryan, Klamath Project, Bureau of Reclamation, dated January 19, 1995

Exhibit E — Letter from Dennis D. Lynch, Geological Survey, Department of the Interior, to Michael J. Ryan, Bureau of Reclamation, dated January 24, 1995

Exhibit F — Memorandum from Tryg Sletteland, Sierra Club Legal Defense Fund, to Klamath Campaign Clients, dated April 21, 1995, regarding Decision Not to Sue on 1995 Operations Plan

Exhibit G — Letter from Richard A. Cross, Alexander & Karshmer, to Michael J. Ryan, Bureau of Reclamation, dated March 31, 1995, regarding Draft 1995 Klamath Operations Plan

Exhibit H — Letter from Elwood Miller, The Klamath Tribes, to Mike Ryan, Bureau of Reclamation, dated May 5, 1995, regarding Call for Scientific Data



Exhibit I — Letter from Richard A. Cross, Alexander & Karshmer, to Mike Ryan, Bureau of Reclamation, dated October 27, 1995, regarding Additional Comments Regarding Draft Technical Memoranda Re: "Key Facilities" and "Runoff Forecasting"

Exhibit J — Letter from Carl Ullman, Water Adjudication Project The Klamath Tribe, to Gary Baker, Bureau of Reclamation, dated October 27, 1995, regarding KPOP Tech Memo: Klamath Basin Runoff Forecasting

Exhibit K — Letter, with attachments, from Richard A. Cross, Alexander & Karshmer, to Michael Ryan and James Bryant, Bureau of Reclamation, dated February 5, 1996, regarding Freedom of Information Act Request

Exhibit L — Letter, excluding attachments, from Richard A. Cross, Alexander & Karshmer, to Roger Patterson and Michael Ryan, Bureau of Reclamation, dated March 15, 1996, regarding Water Required to Be Made Available by the Klamath Project in Satisfaction of the Upper Klamath Basin Component of the Yurok Klamath River Anadromous Fishery Reserved Water Right and the Trust Responsibility

Exhibit M — Letter, excluding attachments, from Richard A. Cross, Alexander & Karshmer, to Michael Ryan, Bureau of Reclamation, dated March 27, 1996, regarding Klamath Project Operations Plan

Exhibit N — Letter from Elwood Miller, Jr., The Klamath Tribes, to Honorable Bruce Babbitt, Secretary of the Interior, dated September 12, 1996, regarding Bureau of Reclamation Kill of Endangered Species in Upper Klamath Lake; 60-Day Notice of Intent to Sue for Violation of the Endangered Species Act

In responding to requests under FOIA, no bureau or department in Interior has withheld documents based on a claimed deliberative process privilege other than the Bureau of Indian Affairs.

5. Exhibit O is a true and correct copy of certain documents supplied to me by Reclamation in response to a FOIA request dated February 27, 1996.

6. Exhibit P is a true and correct copy of KPOP Working Group Meeting Minutes dated October 30, 1995, supplied to me by Reclamation.

7. Exhibit Q is a true and correct copy of a letter from Stephen E.A. Sanders, Oregon Department of Justice, to Martha Pagel, Director, Oregon Water Resources Department, dated March 18, 1996, regarding Klamath Adjudication and Klamath Project operations.



8. On August 23, 1996, I sent a FOIA request to the Office of the Solicitor of Interior and various Regional Solicitor's offices. The FOIA letters requested copies of any correspondence from tribes or their attorneys relating to the March 18, 1996, letter from the Oregon Attorney General (attached as Exhibit Q). Exhibit R is a true and correct copy of the response of Robert T. Anderson, Associate Solicitor, Office of the Solicitor, dated November 15, 1996, with one of its enclosures.

After Interior decided in early 1996 not to release a draft KPOP for public review, it announced that it would pursue a different process for developing a long-term operations plan. In particular, Interior stated that it would prepare an environmental impact statement (EIS) pursuant to the National Environmental Policy Act, in conjunction with the long-term plan. In a discussion with Mr. Kirk Rodgers, Assistant Regional Director, Mid-Pacific Region, Bureau of Reclamation, I learned that three Klamath Basin tribes had proposed to serve as contractors to prepare portions of the EIS. I made known to Mr. Rodgers my concern that irrigation interests do not believe the tribes are disinterested or unbiased as a contractor in such a role should be. I also expressed my concern in a letter to Reclamation dated September 6, 1996, a copy of which is attached as Exhibit S.

After these letters were sent, I received a telephone call from Mr. Karl Wirkus, the current Project Manager of the Klamath Project. I reiterated my concerns to Mr. Wirkus. I also pointed out to him that BIA had refused to provide me with communication between the tribes and Interior, that the tribes are interested parties, and that it, in my opinion, was very inappropriate

under these circumstances for tribes to be retained as consultants.

Mr. Wirkus specifically informed me that if the tribes ever were retained as consultants in Klamath Project planning as the tribes proposed, all communications between them would be open and available to all interested persons.

9. The Association does not intend to participate in the Klamath River adjudication being conducted by the State of Oregon. However, my firm represents the Tulelake Irrigation District, which is a member of the Association, in the adjudication.

10. Interior personnel, including Mr. Steve Palmer from the Regional Solicitor's Office, have advised me that Interior will, in the Klamath River adjudication, file claims to the effect that the Klamath Tribe has water rights in the Klamath River system, but that also the tribe will file a claim or claims on its own behalf. Interior personnel have informed me that Interior will not file claims on behalf of the Yurok Tribe, the Hoopa Tribe, or the Karuk Tribe.

Mr. Palmer has advised me that he is the attorney with primary responsibility for preparing and defining Reclamation's claim of irrigation rights for the Klamath Project.

Department of the Interior (Interior) personnel, including Mr. Palmer, has informed me that Interior will also file claims in the adjudication to assert and protect the irrigation water rights in the Klamath Project.



I have discussed the adjudication on several occasions with Mr. Palmer and other Interior personnel. I have asked Mr. Palmer whether, if irrigation interests submit information or theories related to the adjudication to Interior agencies or the Solicitor's Office, those materials would be made available to tribes or other parties requesting them under FOIA. Mr. Palmer stated that he believed such materials would be made available to those parties on request.

11. Exhibit T is a true and correct copy of Senate Resolution 3, adopted by the Senate of the State of Oregon on April 3, 1997.

12. I have spoken on several occasions with Mr. James Bryant, Repayment Specialist, Bureau of Reclamation in Klamath Falls. Mr. Bryant has informed me that Reclamation has received from tribes requests under FOIA for correspondence, information, or materials provided to Reclamation by irrigation interests or Association members and that these requests have been filled.

13. Exhibit U is a true and correct copy of a letter from me to Roger K. Patterson, Michael Ryan, and David Nawi dated April 23, 1996, regarding KPOP.

14. In February of 1997, our firm served notices of deposition of two Reclamation employees. One purpose of those depositions was to be able to obtain direct testimony on certain subjects discussed herein on matters that Reclamation or Interior personnel have stated. Another purpose was to adduce testimony which I believe would contravene certain assertions of fact made in the Defendants' Motion for Summary Judgment. After defendants moved to quash the

depositions and after discussion by Mr. Hitchings with Ms. Kobbervig, our firm elected to avoid the cost of discovery disputes and wait until after defendants' motion for summary judgment to pursue discovery, if any.

15. Exhibit V is a true and correct copy of a letter from Andrew M. Hitchings, De Cuir & Somach, to Freedom of Information Act Appeals Officer, Department of the Interior, dated September 13, 1996.

16. Exhibit W is a true and correct copy of President's Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993).

17. Exhibit X is a true and correct copy of United States Attorney General's Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act, dated October 4, 1993.

18. Exhibit Y is a true and correct copy of 97 Interior Dec. 21 (July 6, 1989).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 14th day of April, 1997 at Sacramento, California.

/s/ PAUL S. SIMMONS
PAUL S. SIMMONS



To: Files

From: James K. Bryant

Subject: Meeting with Native American Tribes Concerning the Operation of Upper Klamath Lake and the Klamath River System on September 22, 1994.

On September 22, 1994, Reclamation again met with the four Native American Tribes that depend upon the Klamath Basin to discuss our operations. Attendance was as follows:

| | |
|---|---|
| Yurok Tribe | Karuk Tribe |
| Troy Fletcher, Fish Biologist<br>PO Box 218<br>Klamath CA 95548 | Robert Rohde, Fish Biologist<br>PO Box 282<br>Orleans CA 95556<br>916-627-3446 |
| Klamath Tribes | Hoopa Valley Tribe |
| Elwood Miller, Natural Resources Spec.<br>Craig Bienz, Nautral Resources Dir.<br>PO Box 436<br>Chiloquin OR 97624 | Robert Franklin, Hydrologist<br>PO Box 417<br>Hoopa CA 95546<br>916-625-4267 |

Reclamation

Mike Ryan, Area Manager
James Bryant, Chief, Operations
Robert Davis, Chief, Planning
Mark Buettner, Fish Biologist
Klamath Basin Area Office

Fish & Wildlife Service

Tom Stewart, Manager, Klamath Refuges
Steve Lewis, Supervisor, ERO
Gary Hagedorn, Asst, Manager, Refuges
Jim Hainline, Wildlife Biologist
6600 Washburn Way
Klamath Falls OR 97603

The meeting began with the Tribes passing out an agenda that they wanted to follow (copy is attached). The first item was the letter from Roger Patterson to the Klamath Tribes that is presently being prepared concerning the meeting on the 24th of August. They want individual letters to each Tribe. The following positions were then stated by the various Tribes:

Rohde - Karuk Tribe - Their position is the same as in the 1992 Tribal Resolution previously given to Reclamation (4,137.0 on the lake year round and FERC Mins below Iron Gate Dam). Mr. Rohde stated that 4,139 should be used to support the subsistence fishing industry that could be developed again. They believe that the Klamath River fish are moving because of the 900 cfs. They want money for studies and suggested a basin wide study.

Fletcher - Yurok Tribe - They demanded FERC Mins below Iron Gate. They believe that the Burden



of Proof falls on Reclamation to prove that we do not harm the salmon when we drop below FERC Mins. He said that there are lots of fish in the lower Klamath River.

Franklin - Hoopa Valley Tribe - They want a written management plan. They do not want any water delivered to Klamath Drainage District this fall. The Tribe wants us to furnish them a record of decision for going below FERC Mins at Iron Gate. They also want to be part of any decision process (through Tribal Consultations) on water allocations.

Miller - Klamath Tribes - Water level of Upper Klamath Lake is too low and the fish in the lake are in a stressful condition. Wants us to provide the Tribes with a water budget. There can be no allocation to the farmers without an involvement by the Tribes. The Tribes are contemplating a law suit with Reclamation over Indian Trust and ESA responsibilities.

Several Tribal representatives stated that we have been wrong in our operation of the Klamath Project. Indian rights are superior and we have ignored their needs. They claim we are in violation of the Trust Relationship that is required by the Constitution.

Tom Stewart and Gary Hagedorn explained that the Lower Klamath Refuge is about 50% flooded at this time. They need more water than they are getting. Lower Klamath is the only place for the birds to go. 10-12,000 birds have been lost to botulism this year and the losses are continuing to mount. They expect greater than normal bird use this fall. Water from Tule Lake has been used to flood White Lake.

Rohde suggested that Lower Klamath be re-operated to act as an offstream reservoir, providing summer inflow to the Klamath River. The entire Klamath Drainage District could be operated like the historic water cycle of flood in the winter and provide sustainable flows to Kalmath River in the summer.

Mark Buettner stated that the 4,137.0 is the BO minimum and until better data is available we should not vary from the BO. Mark stressed that a lot of cooperation is taking place between the Tribes and Reclamation on studying the suckers. WQ in the lake has been improving for several weeks as a result of cooler weather. Mark does not believe that the blue green algae is a problem this year and that the suckers will not be seriously affected by low water levels in the lake.

The Tribes believe that the risk associated with going below 37.0 is significant and can't be tolerated. Craig Bienz believes that the fish may well go extinct before a threshold elevation is found. There is more that we don't know than we do about the suckers and what is killing them. Craig believes that we may have lost four of the last five years of age class in the lake. The Klamath Tribes believe that the minimum elevation on the lake should be 4,138.5 to 4,139.00. Once we dropped below that level we began to experience fish kills this year.

The Tribes want us to schedule another meeting to lay out our operation plans in accordance with their wishes. The bottom line is not less than FERC Mins, elevation no lower than 37.0 and 95% exceedance factors for projection of inflows. No water to farms or refuges unless these demands are met. Mike suggested a Reclamation Trust Asset Specialist be present at the next



meeting. The Tribes seemed to be OK with this, but not with the idea of including any water users in the meeting. They flatly rejected the concept of having a representative of the irrigators in the meeting, stating that it is a Trust responsibility that will not be debated. The meeting is Government to Government in nature. The irrigators may contact the Tribes for their own meetings.

Troy believes that the pulsed flows this last summer were a last resort. Any success we had with numbers means nothing. If we would have had full FERC flows we would have had greater success. He believes that moving the fish out with an artificial pulse may have stressed the fish.

The Karuk Tribe reiterated their July 19, 1992 letter, stating that we are in violation of the Trust by going below 37 on the lake. The Karuks believe that they have been charged by the Creator with the responsibility of protecting the environment in the Klamath Watershed. Mike responded that the Trust is not an elevation or a flow, but rather the resource. We do not believe we are seriously impacting the resource. The Tribes want a justification letter from us describing the biologic reasons for going below 1,300 cfs and elevation 4,137.0. Further, they want us to return the lake to 37.0 as soon as possible without reducing the flow of the river below 900 cfs. As of September 22, 1994, the lake is 4,136.94.

They again stated that they do not want the irrigation interests involved at this time. They are a sovereign Nation and their Trust assets are not subject to debate.

The Tribes all demanded that we do not release the 6,000 acre-feet of harvest water after October 1. They believe that minimum elevations be maintained in the lake even after September 30, 1994. They wanted our decision immediately. Mike said that he would make that decision in the morning and meet with Rohde at 10.00 a.m. the next day.

We agreed to continue attending meetings with the Tribes. The next meeting will be sometime during the first half of October. Mike will contact Roger Patterson and Mike Spear.

Addendum

After the meeting it was decided to advise Rohde that we will deliver the water to the irrigators for harvest water after the 1st. This will depress the lake level approximately 0.1 foot. Mr. Rohde will be informed by Mike Ryan by letter. In addition, we agreed to notify all of the tribes.

WBR:JBryant:jld:9/26/94: (503) 883-6935
H:\ .\O&M\UKL&LINK\Trib0922.94)



[Seal Omitted]

**The Klamath Tribe**
P.O. Box 436
Chiloquin, Oregon 97624
Telephone (503) 783-2219
FAX (503) 783-2029

December 27, 1994
[Received: Dec. 30, 1994]

Hon. Bruce Babbitt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

re: Reinitiation of formal consultation pursuant to Endangered Species Act §7 and operation of the Klamath Irrigation Project; 60-day notice of violation and intent to sue

Dear Secretary Babbitt:

Operation of the Klamath Irrigation Project by the Bureau of Reclamation in Oregon and California has direct effects on two endangered fish species: the Lost River sucker and the shortnose sucker. These species inhabit Upper Klamath Lake which the Bureau manages as a reservoir for the Project. The species were listed as endangered in 1988. Formal consultation between the Bureau and the U.S. Fish & Wildlife Service resulted in a July 22, 1992, Long Term Biological Opinion (LTBO) concluding that the Project does jeopardize the continued existence of the fish. The LTBO went on to provide certain reasonable and prudent alternatives

for Project operation that the Service asserted would avoid such jeopardization. The LTBO also called for further research into the needs of the fish and the effects of Project management on their survival.

Since the LTBO was written significant research has been carried out on several fronts. Also, in 1994 the Bureau managed the Project in a way that lowered Upper Klamath Like to levels never before experienced, offering an opportunity to gain further knowledge about the effects of project management on fish habitat. In addition, certain premises on which the LTBO is based are now known to be incorrect. These factors, and others, make it clear that the best scientific and commercial data available require the conclusion that the LTBO is no longer adequate to protect the two listed species from extinction by Project operations, even if the current reasonable and prudent alternatives are adhered to by the Bureau. Indeed, all available data indisputably show that, under the current LTBO, in 1992 and 1994 the entire year classes of endangered fish were lost.

The purpose of this letter is to request that the Bureau and the Service reinitiate formal consultation under the Endangered Species Act so that the LTBO can be revised to reflect new knowledge and to protect the endangered fish. At 50 CFR § 402.16 four criteria are set out, any one of which triggers mandatory reinitiation of consultation. At least three of those criteria are satisfied in the current situation. Two of these three are satisfied in more than one way.

I will discuss each of those criteria in turn. But before doing that let me point out three important aspects of the matter. First, all of the information



necessary to reach a decision on reinitiation of consultation has been in the hands of the Service and the Bureau long enough to allow a reasoned decision. The reinitiation decision of course depends in large part on new information gathered since the 1992 LTBO was written. The Bureau and the Service have had most of that information since August. They have had *all* the information at least since a November 30, 1994, conference of tribal, Service, and Bureau biologists. That conference was followed by a December 16 meeting with those biologists, the Klamath Project Manager and his staff, and District representatives of the Service at which the information was again discussed in detail. Despite this review, the agencies have not been willing to make a commitment to undertake reinitiation. They have offered no reason for not reinitiating consultation and have said they view reinitiation as a likely step. But they have not begun the process nor have they made any commitment to do so. It is time now to reach a decision on the simple, threshold question of whether to reinitiate.[1]

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[1] The Bureau and the Service have chosen not to develop an analysis of the new information themselves. Rather they have awaited the Tribes' analysis of the new information, and have now elected to send that tribal analysis "out for peer review" to several federal agencies with no fixed return date. The Bureau says that after this federal peer review, a similar process will be undertaken with state agencies and with the public.

The enormous delays threatened by this cumbersome process are unnecessary and will be entirely ineffective because (1) neither the Secretary, nor the Bureau, nor the Service has ever operated the Project, or based its Endangered Species Act decisions, on peer review of this type, (2) nobody in any agency has offered any reason why the new information leads to anything but the obvious conclusion that reinitiation is necessary, and (3) critical information

Second, the need to revise the LTBO is obvious and the data supporting it is overwhelming. Just above, I characterized the reinitiation decision as "simple" in part because the new information is so striking. Studies commissioned by the Bureau show that Project operations under the existing LTBO have allowed the complete loss of the entire year-class of both species of endangered suckers in two of the last three years. (Those years were 1992 and 1994, the two low-water years since the LTBO. If 1995 is another low water year there is no reason to hope for year-class survival under the current LTBO.) This fact is not in dispute. It is established by independent studies commissioned by the Bureau and performed by Oregon State University. This alone is enough to compel reinitiation.

Third, time is critical. If the Bureau is to operate the Project in 1995 pursuant to a meaningful and effective LTBO, the process of reinitiation must begin right away. Bureau plans currently call for irrigation water deliveries to begin in mid-April. By that time the Project must have the guidance of a new LTBO if it is to avoid further fish kills.

With this brief background, let me turn to the criteria compelling the Bureau and Service to reinitiate consultation pursuant to 50 CFR § 402.16.

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like the year-class losses is not even a part of the review, so nothing will be gained by the delay. In short, there is no reason why the agencies should not reach a prompt decision on whether to reinitiate.



## CRITERIA FOR REINITIATION OF §7 CONSULTATION

50 CFR § 402.16(a): The amount or extent of taking specified in the incidental take statement is exceeded.

The 1992 LTBO allows certain incidental take of endangered suckers by Project operations.[2] At page 40 the Incidental Take Statement of the LTBO specifically provides that "[c]onsultation should be reinitiated if take occurs . . . as a result of the project . . . activity not specified in this biological opinion."

In 1994 Project activities went beyond those specified in the Biological Opinion as the Project was operated in disregard of the reasonable and prudent alternatives of the LTBO. In particular, the LTBO required that the level of Upper Klamath Lake not be drawn below 4137.0 feet above sea level. Despite this clear requirement, the Bureau drew the lake below that elevation, and maintained the surface elevation below

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[2] The LTBO's incidental take statement is itself fatally flawed. At LTBO page 40 the statement can be read to allow *all* the endangered fish to be killed as incidental take. The statement provides that "[a]ny suckers in the water delivery systems including canals, drains, fields, headgates, and turnouts" and "[s]uckers in the Klamath Project lakes and reservoirs" can be killed as incidental take.

These locations describe nearly all the habitat used by the fish (except for certain spawning streams tributary to the Lake); these locations are of course described as important fish habitat in the LTBO. Allowing unlimited take of fish in all these locations unavoidably allows their extinction. Nothing could be further from the purpose and letter of the Act. The LTBO must be rewritten to correct this deficiency.

the level specified in the LTBO for more than six weeks.

Both before and during this violation of the LTBO take occurred. In particular, at least one dead adult sucker was found near Hagelstein Park on the east shore of the Lake in late September during the period of violation. This fish kill is take that exceeds the amount specified in the incidental take statement. Both the CFR and the LTBO itself require reinitiation of consultation in this circumstance.

50 CFR § 402.16(b): New information reveals effects of the action that may affect listed species in a manner or to an extent not previously considered.

This criterion is met in three related but separate ways, any one of which is sufficient to require mandatory reinitiation of consultation.

* As mentioned above, since the time the LTBO was written a great deal of research and analysis has been done regarding the habitat requirements of the suckers, the effects of Project operations, and the adequacy of LTBO requirements to protect the fish. This work makes it painfully clear that the reasonable and prudent alternatives in the LTBO are inadequate to protect fish from lethal water quality deterioration.

Attached here is a copy of the December 8, 1994, letter from the Tribes' Chief Biologist Craig Bienz to biologists from both the Service and the Bureau. The letter follows up on a meeting at which those scientists shared the results of their research.



As the letter makes clear in its narrative, statistics, and graphs, water quality deterioration–often to lethal levels–is directly correlated to Project management of Lake water levels and inflow-outflow regimes. This was not previously considered in the LTBO. Rather than repeating the details of that analysis, I will incorporate that letter here by this reference and commend it to your study. It makes clear that the management requirements of the LTBO's reasonable and prudent alternatives are not adequate to protect the fish from extinction due to lethal water quality conditions including elevated pH and reduced dissolved oxygen levels. In particular the Lake elevations, and their timing, as specified in the LTBO (for example the 4139.0 foot elevation) cause lethal water quality conditions to occur frequently.

Now that the effects of Project operations on water quality are better understood, and because the deterioration of water quality has a direct effect on the endangered fish, the LTBO must be rewritten to incorporate this new information that reveals effects not previously considered.

* The 1992 LTBO predicts the existence of "refugial areas" to which it trusts the fish will repair during times of lethal water quality elsewhere in the Lake brought on by Project activities. In 1994 Bureau management relied heavily on the "refugial areas" provisions of the LTBO as it drew the Lake down to levels never before experienced. The Bureau anticipated that water quality would suffer, but it trusted that the fish would resort to the "refugial areas" for survival.

Unfortunately, the "refugial areas" did not prove effective. In 1994 the Bureau conducted radio-tracking studies of adult suckers in the Lake. These studies showed conclusively that the fish do *not* make use of "refugial areas" in the ways anticipated by the LTBO. Rather, the fish absorb the full brunt of water quality deterioration and riparian habitat loss caused by artificially low Lake elevations.

Neither the Bureau nor the Service previously considered the fact that the concept of "refugial areas" is not valid in the instant context. The LTBO must be revised in its reliance on the concept.

* The LTBO does not consider the effect of Project operation on overwinter survival of fish. It is clear that winter kill is a problem that is exacerbated by artificially low Lake levels brought on by Project operation.[3] Project management withdraws water in the fall, leaving Lake levels artificially low as winter freezes the Lake surface. As the attached article explains in detail, this correlates strongly with degraded water quality caused by an increased oxygen depletion rate.

The existing LTBO has not previously considered this effect of Project operations on the endangered fish. The LTBO must be revised to address this problem.

<u>50 CFR 402.16(c): The Project action is subsequently modified in a manner that causes an effect to the listed species that was not considered in the LTBO</u>.

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[3] See, for example, Mathias and Barica, "Factors Controlling Oxygen Depletion in Ice-Covered Lakes," Can. J. Fish. Aquat. Sci., Vol. 17, p. 185, 1980 (copy attached).



This criterion is met in two ways, either of which is sufficient to require mandatory reinitiation of consultation.

* The 1992 LTBO is based on a Biological Assessment provided to the Service by the Bureau. That Assessment informed the Service that Bureau irrigation water withdrawals from Upper Klamath Lake end in September, and that the Lake begins to refill in October. As a result of this representation by the Bureau, the LTBO does not address Project management of the Lake after September.

In 1994 Project operation was modified. Water withdrawals continued into October, continuing to draw Lake levels down. This compromises the attainment of depths necessary to protect water quality and to minimize winer kill.

This modification of Project management has a direct effect on listed species. That effect was not considered in the LTBO. The LTBO must be rewritten to consider these effects.

* Project management was further modified in 1994 as it drew Lake levels down to elevations never before experienced. The LTBO as written anticipates Project management within the range of Lake levels historically experienced. The drawing down of the Lake below 4137.0 feet in 1994 took management outside that window of experience.

No consideration is given in the LTBO to the effect of such a management regime on the endangered fish. Obviously a change in Project operations that leaves the Lake with less depth than at any time in history is

deserving of consideration in the LTBO. Reinitiation of consultation is needed to include this consideration.

## CONCLUSION

The 1992 LTBO may never have been adequate to the task of protecting Lost River and shortnose suckers from extinction by operation of the Klamath Irrigation Project. Be that as it may, it is now clear that several shortcomings exist in the document and that it must be revised if it is to avoid further jeopardization, and extinction, of the endangered fish. The Endangered Species Act and the regulations promulgated thereunder contemplate such an eventuality and they *require* reinitiation of consultation both by the Bureau and the Service. 50 CFR § 402.16.

First, as regards reinitiation criterion (a), the "take" of the endangered species has exceeded that anticipated by the LTBO. This means the LTBO has not properly anticipated the effect of Project operations. The LTBO is not protecting the fish as effectively as intended, or as required by the Endangered Species Act. It must be rewritten to be brought into compliance with the Act and its goals.

Second, as regards reinitiation criterion (b), recent Lake elevation management has offered an opportunity to study Project management's effects on fish in ways not previously possible. Also, ongoing Lake studies have added three years of valuable data since the time the LTBO was written. The resulting new information reveals that the Project adversely affects the fish in ways not previously considered. The LTBO needs to be rewritten to incorporate this new and valuable information.



Third, as regards reinitiation criterion (c), the LTBO is based on a description of Project actions that is no longer accurate because Project management has been modified. The changes in management have adverse effects on the endangered fish. The LTBO must be rewritten to consider the full range of Project effects. Otherwise effects not considered in the LTBO will continue to push the fish toward extinction.

Under these circumstances reinitiation of formal consultation is required by the Act and the regulations. At 50 CFR § 402.16 provision is made for either the Bureau or the Service to take the necessary action. Neither agency needs to wait for the other to act. Thus far no action has been taken. This is a violation of the Act and the regulations.

Accordingly, the Klamath Tribes respectfully demand that the Bureau and/or the Service immediately reinitiate consultation pursuant to the Endangered Species Act and regulations. This is the only responsible step for the Department in light of the best available scientific and commercial data. In order to protect the Tribes' right to continue the struggle to avoid extinction of resources important to the physical and spiritual well-being of our people, I am required to add the following.

This letter provides written notice of violation of the Act and regulations as described above. It is also the Tribes' 60-day notice of intent to sue pursuant to the Act, including 16 USC § 1540, if the actions demanded herein are not taken by you and the Department.

This letter is also the Tribes' 60-day notice of intent to sue in connection with violations of the Act brought

to your attention in my letter of November 28, 1994. A copy of that letter is attached here and incorporated by this reference. As you will recall, that letter pointed out that the Klamath Irrigation Project is operated without the pre-season operating plans and criteria required for protection of endangered species and tribal treaty rights. If the inadequacies and violations described in that letter are not corrected, we will have no choice but to file suit.

I regret having to end this letter in this tone, but such are the requirements of the law. Unfortunately the Tribes have no assurance that the Endangered Species and treaty rights concerns set out in this and my previous letter will be addressed in time to save these fish from extinction. Time is truly a critical factor, especially with the 1995 water management season approaching soon. I urge you to give these matters the highest priority within the Department.



Thank you very much for your attention to these important matters.

Very truly yours,

/s/ ILLEGIBLE

Marvin Garcia
Chairman

cc: Roger Patterson, Regional Director, BOR
Mike Ryan, Klamath Project Manager
Mike Spear, Portland Regional Director, USFWS
Dale Hall, Deputy Portland Regional Director, USFWS
Daniel Beard, Commissioner, BoR
Mollie Beatty, Director, USFWS
Ada Deer, Ass't Secretary for Indian Affairs
George Frampton, Ass't Secretary for Parks and Wildlife
Michael Anderson, Associate Solicitor for Indian Affairs
Hoopa Valley Tribe
Karuk Tribe
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February 5, 1996

Michael Ryan
James Bryant
Bureau of Reclamation
6600 Washburn Way
Klamath Falls, Oregon 97603

Re: Freedom of Information Act Request

Gentlemen:

This is a Freedom of Information Act Request. Within the period provided by law, please provide copies of the following documents.

1. From December 1, 1995, to and including the date of responding to this request, all letters and/or records of communications, verbal and otherwise, to or from any or all of the following:
   a. DeCuir & Somach, including but not limited to Paul Simmons, Stuart Somach, and Don Mooney;
   b. the Klamath Basin Water Users Association, including but not limited to, David Zeppone;
   c. David Solem;
   d. Earl Danosky;



   e. Marshall Stanton;
   f. the Tule Lake Irrigation District;
   g. the Klamath Irrigation District;
   h. the State of Oregon Water Resources Department;
   i. the State of Oregon Department of Environmental Quality;
   j. the California North Coast Regional Water Quality Control Board;
   k. David Vogel;
   l. Keith Marine;
   m. Pacifi Corp;
   n. Roger Patterson;
   o. Kirk Rogers;
   p. Les Ramirez; and
   q. Klamath County, including, but not limited to its Board of

2. The statutes, regulations, deeds, instruments or permits by which in 1905 the State of California transferred to the Klamath Project and/or the Bureau of Reclamation (the "Klamath Project/BOR") the right to use the then unappropriated waters of the Klamath and/or Lost Rivers;

3. Any and all operations plans, other than the 1995 Interim Operations Plan, by which the Klamath Project/BOR has agreed to operate, or has operated, the Klamath Project;

4. All writings of any kind, including memoranda, reports, correspondence and other documents,

discussing the quanitification of the reserved water rights of the Yurok, Hoopa or Karuk Tribes;

5. For the period from October 1, 1995, to and including the date of responding to this request, all documents which show or state the amounts of water delivered by the Klamath Project to any Project customers or users, including the date and amount of water delivered, and the point to which the water was delivered[1];

6. For each and every delivery identified in response to the previous request, all documents which show, state, describe or discuss whether and how the Klamath Project/BOR determined that the delivery of water was in excess of and/or not required to satisfy the reserved water rights of the Yurok, Hoopa, Karuk or Klamath Tribes; and

7. Any and all permits or licenses issued by the California State Water Rights Board and/or the California State Water Resources Control Board to the Klamath Project/BOR.

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[1] A summary of such documents is acceptable.



With best regards.

Very truly yours,

ALEXANDER & KARSHMER

/s/ ILLEGIBLE

Richard A. Cross

[Seal Omitted]

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, Oregon 97603

KO-110 [MAR. 4, 1996]
RIM-6.10

Alexander & Karshmer
Richard A. Cross
2150 Shattuck Avenue, Suite 725
Berkeley CA 94704

Subject: Freedom of Information Act (FOIA) Request. Your Letter Dated February 5, 1996 and February 12, 1996

Dear Mr. Cross:

This letter is in response to your February 5, 1996 Freedom of Information Act (FOIA) request.

**Question # 1**

Enclosed please find the following documents:

Letter to Roger Patterson dated 2/16/96 from Lynn Long (control #6-1627)
Letter to KPOP Working Group dated 2/23/96 from Gary Baker
Letter to KPOP Working Group dated 2/15/96 from Gary Baker
Letter to KPOP Working Group dated 2/06/96 from Gary Baker



Letter to KPOP Working Group dated 1/25/96 from Gary Baker
Letter to KPOP Working Group dated 1/09/96 from Gary Baker
Letter to KPOP Working Group dated 12/22/95 from Gary Baker
Letter to KPOP Technical Group dated 12/22/96 from Gary Baker
Letter to KPOP groups dated 12/22/95 from Mike Ryan
Letter to KPOP Technical Group dated 12/1/95 from Gary Baker
Letter from DeCuir and Somach dated 2/15/96 and attachments (control #6-1609)
Letter from Dave Zepponi dated 2/27/96 to Secretary of Interior (control #6-1636)
Letter from Dave Zepponi dated 2/20/96 to Mike Ryan and Mark Buettner (control #6-1320)
Letter from Dave Zepponi dated 2/22/96 to Gary Baker (control #6-1623)
Letter from Dave Zepponi dated 1/1/96 to Mike Ryan (control #6-1584)
Letter from Dave Zepponi dated 2/7/96 to Jim Bryant (control #6-1585)
Letter to Dave Zepponi dated 2/26/96 from Mike Ryan
Letter to Dave Zepponi dated 12/15/96 from Gary Baker
Letter to Dave Zepponi dated 12/1/96 from Mike Ryan
Letter to Dave Solem dated 2/13/96 from Mike Ryan
Letter to Dave Solem dated 2/12/96 from Jim Bryant
Letter cced to Dave Solem dated 2/6/96 from Jim Bryant
Letter cced to Dave Solem dated 2/2/96 from Jim Bryant
Letter cced to Dave Solem dated 1/23/96 from Jim Bryant

Letter cced to Dave Solem dated 1/8/96 from Jim Bryant
Certificate of Insurance issued to KID dated 1/4/96 (control #6-1404)
Letter from KID dated 12/1/96 to Mike Ryan (control #6-1128)
Letter to Earl Danosky dated 2/26/96 from Jim Bryant
Letter to Earl Danosky dated 2/23/96 from Jim Bryant
All-Purpose Acknowledgment from State of California for Irrevocable Election associated with Tulelake Irrigation District dated 2/13/96 (control #6-1599)
Letter from Earl Danosky dated 1/1/96 (control #6-1397)
Letter to Earl Danosky dated 2/26/96 from Jim Bryant
Letter cced to TID dated 2/26/96 from Jim Bryant
Letter to Earl Danosky dated 2/23/96 from Jim Bryant
Letter cced to TID dated 2/22/96 from Jim Bryant
Letter cced to TID dated 2/1/96 from Jim Bryant
Letter cced to TID dated 2/2/96 from Jim Bryant
Letter cced to TID dated 12/8/95 from Jim Bryant
Letter to Marshall Staunton dated 12/4/95 from Gary Baker
No letters/documents found sent to or received from State of Oregon Water Resources Department
Letter from Oregon DEQ dated 2/12/96 to Mark Buettner (control #6-1608)
Letter to Oregon DEQ dated 12/26/95 from Gary Baker
No letters/documents found sent to or received from North Coast Regional Water Quality Control Board
Letter from Dave Vogel dated 12/28/95 to Gary Baker (control #6-1286)
No letters/documents found sent to or received from Keith Marine
Letter from PacifiCorp dated 3/1/96 to Mike Ryan. (control #6-1638)



Document from PacifiCorp dated 2/15/96 entitled: PacifiCorp Review of KPOP Alternatives (control #6-1607)
Letter from PacifiCorp dated 2/2/96 to Gary Baker (control #6-1572)
Letter from PacifiCorp dated 1/26/96 to Mark Buettner (control #6-1562)
Letter from PacifiCorp dated 12/29/95 to "Planholder" and cy of Acknowledgement of Receipt from Jim Bryant (control #6-1419)
Letter cced to PacifiCorp from Fish and Wildlife Service dated 12/11/95 to Mike Ryan (control #6-1158)
Letter to PacifiCorp (Dale Foresee) dated 1/12/96 from Mike Ryan
Letter to Doug Bornemeier (PacifiCorp) dated 12/8/95 from Gary Baker
Letter from Roger Patterson dated 2/15/96 to "All Corncerned" (control #6-1634)
Letter to Roger Patterson (cced to Mike Ryan) dated 2/2/96 (control #6-1587)
Letter from Roger Patterson dated 1/31/96 to "All Concerned" (control #6-1605)
Letter to Roger Patterson dated 1/31/96 (cced to Mike Ryan) (control #6-1577)
Letter from Roger Patterson dated 1/23/96 to "All Concerned" (control #6-1574)
Letter to Roger Patterson dated 2/26/96 from Mike Ryan
Letter to Roger Patterson dated 2/26/96 from Jim Bryant
Letter to Roger Patterson dated 2/2/96 from Mike Ryan
Letter to Roger Patterson dated 2/1/96 from Jim Bryant

Letter to Roger Patterson dated 1/25/96 from Mike Ryan
No letters/documents found sent to or received from Kirk Rodgers
Letter to Les Ramirez/Roger Patterson/David Cottingham dated 1/9/96 from Yurok Tribes (control #6-1426)
Letter from State of Oregon dated 2/20/96 to Teena Baker (this office) cced to Board of Supervisors, Klamath County (control #6-1624)
Letter to DEQ from City of Klamath Falls dated 2/12/96 (control #6-1596) (copy rec'd for our records)
Letter from Klamath County Board of commissioners dated 2/16/96 to Mike Ryan
Document from Water Resources Department of Oregon (rec'd 2/1/96) (Control #6-1570)
Letter from Klamath County, Board of Commissioners dated 1/15/96 to Mike Ryan (Control #6-140)
Letter to Klamath County dated 1/23/96 from Jim Bryant
Letter from PacifiCorp dated 2/28/96 to Mike Ryan (control #6-1639)
Letter from PacifiCorp (draft) dated 2/26/96 re: Tulana Farms

**Question # 2**

Prior to December 19, 1914, appropriative water rights could be acquired in California by posting and recording a notice stating the nature and quantity of the proposed appropriation and by thereafter exercising due diligence in putting the water to beneficial use.

Klamath River—Water is not diverted from the Klamath River in California for the Project. Therefore, no appropriations were filed with the State of California.



Lost River—The following postings were made:

*1. Notice of Appropriation of all the unappropriated waters, approximately 10,000 miners' inches (equivalent to a flow of 250 cubic feet per second) (in California and Oregon a flow of 40 miners' inches is equivalent to a cubic foot per second), and maximum flow of 150,000 miners' inches, of Willow Creek, Miller Creek, Clear Lake and its tributaries, and Lost River in Modoc County, California, was posted on behalf of the United States at the intended point of diversion on July 8, 1909, and was filed and recorded July 14, 1909, in Volume 2, Page 84 of "Water Claims," Modoc County, California.*

*2. A previous notice of appropriation covering 5,000 second-feet of the waters of Lost River was posted December 19, 1904, and recorded on December 28, 1904, on Page 15 of Volume 2 of "Water Claims" of Modoc County. This notice was also recorded in Klamath County, Oregon, Volume 1, at Page 185, "Water Rights."*

*3. A Notice of Appropriation of all of the unappropriated waters of Willow Creek, Mill Creek, Clear Lake, Lost River and Tributaries, etc., being an average yearly flow of 10,000 miners' inches (250 cfs) and maximum flow of 150,000 miners' inches, was posted relative to diversion in Sections 22, 23, 26, and 27 of T.48N., R.7E., MDB&M, and was recorded April 9, 1910, on Page 132 of Volume 2 of "Water Claims," Modoc County.*

*4. A nearly identical notice concerning diversion in Sections 25, 26, 35, 36 of T. 48 N., R. 7 E., MDB&M, was posted and recorded on April 9, 1910, on Page 134 of Volume 2 of "Water Claims," Modoc County, California.*

**Question # 3**

Prior to the 1995 Interim Operation Plan there were no formal operation plans.

**Question # 4**

Reclamation does not have any documents relating to quantifying reserved water rights of the Yurok, Hoopa or Karuk Tribes.

**Question # 5**

Monthly water delivery records are included for the following delivery points:

- A Canal (Diverts directly from Upper Klamath Lake)
- Station 48 (Diverts from the Lost River Diversion Channel)
- Miller Hill Pumping Plant (Diverts from the Lost River Diversion Channel)
- North Canal (Diverts from the Klamath River)
- Ady Canal (Diverts from Klamath River)
- West Canal in Langell Valley (Includes water released from Clear Lake)
- East Malone Lateral in Langell Valley (Includes water released from Clear Lake)
- North Canal in Langell Valley (Includes water released from Gerber)



Daily flow records are also available if desired. The individual districts maintain records of water deliveries.

**Question # 6**

To our knowledge, no quantifying reserved water rights of the Yurok, Hoopa or Karuk Tribes has been completed by the Interior or Justice departments. Therefore, it would not be possible for Reclamation to determine if water deliveries described in question # 6 were in excess of and/or not required to satisfy the reserved water rights of the named Tribes.

**Question # 7**

There have been no permits or licenses issued by California State Water Rights Board or California State Water Resources Control Board to the Klamath Project.

The following is a summary of charges for this Freedom of Information Act request:

| | | |
|---|---|---|
| 16 quarter hours of professional research @4.65 per qtr. hr: | | 74.40 |
| 853 copies of documents @ .13 per copy: | | 123.89 |
| 40 quarter hours of administrative/clerical work time @2.30: | Total cost: | 92.00<br>289.29 |

Fees are assessed when the cost of the request is estimated at over $15. You are considered non-commercial and the cost above reflects two hours of search time free and the first 100 copies free. Interest will be charged in accordance with the Debt Collection Act of 1982, 31 U.S.C. 3717, and implementing regulations in 4

CFR 102.13, if the fees are not paid within 30 calendar days of the date of this billing.

Enclosed you will find a pre-addressed envelope for your convenience in mailing payment. If you have any questions, please don't hesitate to call me at (541)883-6935.

Sincerely,

/s/ MICHAEL J. RYAN
MICHAEL J. RYAN
Area Manger

Enclosures



ALEXANDER & KARSHMER
ATTORNEYS AT LAW
(A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION)
2150 SHATTUCK AVENUE, SUITE 725
BERKELEY, CALIFORNIA 94704
(510) 841-5056
TELECOPIER: (510) 841-6167

March 15, 1996
[Received: Mar. 18, 1996]

Roger Patterson
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

Michael Ryan
Bureau of Reclamation
6600 Washburn Way
Klamath Falls, Oregon 97603

Re: Water Required to Be Made Available by the Klamath Project in Satisfaction of the Upper Klamath Basin Component of the Yurok Klamath River Anadromous Fishery Reserved Water Right and the Trust Responsibility

Gentlemen:

The purpose of this letter is to reiterate and state as clearly as possible what the Yurok Tribe has already set forth at length in the Trihey and Balance reports and the March 5 and 6 letters from Susie Long and me, all of which were mailed to you last week. As explained below, that mailing was and is an evidentiary showing regarding the approximation of the Upper Klamath

Basin component of the Yurok Klamath River anadromous fishery reserved water right (the "Yurok Showing").

At page 27 of the Trihey report there is a water release schedule (the "Release Schedule"). The Schedule is a statement of the amounts of water required to be released, passed through, or spilled by the Klamath Project in order to satisfy the Upper Klamath Basin component of the Yurok Klamath River anadromous fishery reserved water right. A copy of the Schedule is enclosed with this letter.

Although the Schedule and the Yurok Showing may be of use to Reclamation in developing a "water advisory," or an interim operations plan, or a final operations plan, should any of these planned documents see the light of day, the primary purpose of the Showing is *not informational*. Rather, it is a statement of the actions currently required to be taken by Reclamation and the Klamath Project as a result of the Yurok Tribe's approximation of the above referenced reserved water right.

Compliance with the Schedule is obligatory for the following reasons.

The Yurok Tribe is the holder of a reserved water right for instream flows necessary for the maintenance and recovery of the Klamath River anadromous fishery. My letters to you of March 13, 1995 and March 6, 1996, and the Regional Solicitor's July 25, 1995 memorandum to you, establish this fact. Although, as noted by the Regional Solicitor, this right has yet to be judicially unquantified, Reclamation is not free to ignore it or to refrain from taking whatever steps are necessary to



determine as precisely as possible the extent and nature of the right and to ensure that the operations of the Klamath Project do not trespass against the right or otherwise violate it. To the contrary, by virtue of the law of water rights *and* the federal trust responsibility, Reclamation is required to martial the available reliable relevant scientific evidence regarding quantification of the right and to "approximate"[1] what a court would hold the right to be. In other words, Reclamation has a present duty administratively to approximate as precisely as possible the extent and nature of the above referenced reserved water right.

Notwithstanding this duty, and notwithstanding the development for the better part of the last year of what Reclamation has billed as a Klamath Project Operations Plan, as of March 4, 1996, Reclamation had not mustered *any* information regarding quantification of the Yurok reserved right. (See Request No. 4 of my February 5 FOIA and Mr. Ryan's March 4 response.) And unless someone besides the Yurok Tribe has come forward with significant, reliable evidence on the question of approximation since then, the Yurok Showing is the *only* evidence available to Reclamation regarding the extent and nature of its present duty to satisfy the Upper Klamath Basin component of the Yurok Klamath River anadromous fishery reserved water right.

The Tribe expects and demands, therefore, that water be released in the amounts, and at the times, shown in the Schedule. I reiterated this demand to Mr. Ryan in a telephone conversation we had on March 12,

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[1] The term is Mr. Ryan's.

and I repeated the same to David Nawi in a telephone conversation he and I had on March 14.

If, in spite of the Showing, Reclamation intends not to act in accordance with the duty we have articulated, then pursuant to its trust responsibility generally, and the 1995 Memorandum of Agreement signed by Reclamation and the Klamath Basin Tribes in particular, it is required promptly to provide the Yurok Tribe with a full statement of the reasons for its failure to act.

Thank you for your time and attention.

Very truly yours,

ALEXANDER & KARSHMER

/s RICHARD CROSS
RICHARD CROSS, Esq.

Enclosures

cc:
Susie Long, Yurok Chairperson
Elwood Miller, Chair, Klamath River Intertribal Fish and Water Commission
Eluid Martinez, Commissioner
Catherine Vandemoer, Staff Assistant for Water Rights
Anne Crichton, Solicitor's Office
Bob Anderson, Solicitor's Office
David Nawi, Regional Solicitor



[Seal Omitted]

**The Klamath Tribes**
P.O. Box 436
Chiloquin, Oregon 97624
Telephone (503) 783-2219
FAX (503) 783-2029
800-524-9787

September 12, 1996

The Honorable Bruce Babbitt
Secretary of the Interior
1849 C Street NW
Washington, D.C. 20240

re: Bureau of Reclamation kill of Endangered Species in Upper Klamath Lake; 60-day notice of intent to sue for violation of the Endangered Species Act

Dear Secretary Babbitt:

An unprecedented kill of two Endangered Species is taking place in the Upper Klamath Lake, Oregon. The Lake is managed by the Bureau of Reclamation as part of the Klamath Project. Despite the tragic fish kill Reclamation is continuing to withdraw water from the Lake, reducing habitat and compromising the ability of the surviving fish to persist. I am writing you on behalf of the Klamath Tribes to respectfully request and demand that you instruct Reclamation to stabilize the Lake in order to protect the fish. You are responsible for taking action both under the Endangered Species Act and pursuant to the Treaty between the United States and the Klamath Tribes.

The fish are two species of desert-lake dwelling fish known to us as "c'wam" and "kuptu" and to the non-Indians as "Lost River suckers" and "shortnose

suckers." For thousands of years these fish have provided for the physical and spiritual well-being of our people. We were promised by the United States in the Treaty of 1864, in exchange for our cession of millions of acres of our lands, that the United States would protect our ability to continue to harvest these fish.

Now our fisheries are closed because the populations have collapsed and the fish are listed as endangered. Worse, today the fish are dying by the thousands because of Reclamation's mismanagement of the Lake. Despite our strongest protests Reclamation refuses to take steps to protect these fish. Instead, Reclamation continues its so-called "management" by allowing agricultural users to withdraw as much water from the Lake as they want, without any Interior control whatsoever. A clearer example of an agency's complete capitulation to the interests it is supposed to regulate is hard to imagine. This would be merely illegal and embarrassing were it not resulting in the added, immediate tragedy of the death of tens of thousands of endangered fish.

The situation is remarkably like that of endangered cui-ui fish in Pyramid Lake. There the presence of an endangered species and a treaty-protected fishery caused the federal courts to rule that your office must give priority to fish protection over *all others uses* of the water. *Carson-Truckee Water Conservation District v. Watt*, 549 F. Supp. 704, 710, 713 (D. Nev. 1982). You must assert your control to the fullest extent possible to preserve water for tribal fisheries. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp 252 (D.C. Cir. 1973).



The problem for the fish is caused in large part by reduction of their habitat in the Lake. Since the fish kill began in August Reclamation has continued to "manage" for unlimited withdrawals causing a reduction of 30% of the fish's habitat in the Lake. Reclamation is continuing to allow withdrawals that will push this figure over 50% soon.

Reclamation has offered only the most unpersuasive, nearly preposterous, excuses for its refusal to respond to this crisis by keeping more water in the Lake. The excuses only serve to highlight Reclamation's lack of commitment to, and understanding of, protection of the fish.

For example, Reclamation claims that the bacterial infection that is the direct cause of the deaths will peak. One certainly hopes so, but it has not happened yet in the four weeks of Reclamation inaction. The kill continues today as vigorously as it did two weeks ago. Inaction is not excusable on the grounds that sooner or later Reclamation thinks the kill will abate.

Reclamation also lamely explains that the poor water quality conditions for the fish are caused by atmospheric conditions (low wind and high temperature). Of course, each of these conditions, when adverse, would be mitigated by the retention of more water in the Lake. Reclamation's explanation wholly misses the point.

For scientific reasons explicitly laid out in a meeting on Friday, August 30, federal and tribal biologists agreed that retaining more water in the Lake would maximize the probability of fish survival. Reclamation offers you no justification for inaction in the face of a

tragedy of this magnitude. Instead, it continues to reduce the habitat by withdrawing water needed for the survival of these precious fish. The Endangered Species Act requires that you assure Reclamation's actions do not jeopardize these fish. Obviously that assurance is missing in this situation— fish are dying by the thousands and Reclamation has no plausible excuse for continuing to reduce the habitat.

Surprisingly, Reclamation could use the Project's flexibility to alleviate this situation but, again, it refuses to do so. It has water stored in other Project reservoirs that could be used in place of the water being withdrawn from Upper Klamath Lake. Reclamation simply refuses to use this water because it hasn't been used in the past. Again, this is no justification for inaction.

Mr. Secretary, your obligation in this tragic situation is to do everything in your power to save these fish. That includes stopping agricultural withdrawals from Upper Klamath Lake. The priority water right in this situation is clearly with the fish, and the law clearly requires action.

Once agin, I respectfully request (demand) that you immediately take steps to stabilize the lake surface elevation of Upper Klamath Lake. I also ask that you let me know as soon as possible what steps you intend to take to respond to this crisis.



Thank you very much for your attention to this critical matter.

Very truly yours,

/s/ ELWOOD H. MILLER, JR.
ELWOOD H. MILLER, JR.
Director, Department of
Natural Resources

cc: Patricia Beneke
Ada Deer
John Leshy
David Cottingham
Kate Vandemoer
Bob Anderson

[Seal Omitted]

**The Klamath Tribes**
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February 23, 1996
[Received: Feb. 26, 1996]

Patricia Beneke
Assistant Secretary for
Water and Science
Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

John Leshy
Solicitor
Department of the
Interior
1849 C Street N.W.
Washington, D.C. 20240

Eluid Martinez
Commisioner of
Reclamation
Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

re: Reconciling the KPOP with the Klamath Basin Adjudication

Dear Ms. Beneks, Mr. Leshy, and Mr. Martinez:

Thank you for agreeing to meet with representatives of the Klamath Tribes to discuss this important matter. This letter, in two sections, is offered as preparation for



that discussion. The first section reviews the interests that must be reconciled, and it sets out some of the reasons why a 1996 interim water management plan is both an available and an advisable resolution of the situation.

The second section considers the current foundation of the KPOP, and it explains why this foundation is badly flawed and cannot warrant compromising the Department's effort to protect the Tribes' water rights in the Klamath Basin Adjudication.

1. An interim plan will allow time for deliberate, well-informed decisions on water management in the Klamath Basin

The dilemma. As you are aware, the emerging KPOP may be based on USGS information that does not include the product of study and analysis being done, but not yet completed, in preparation for the Adjudication by experts retained by the BIA. The product of this BIA work will go to the very heart of the questions surrounding Lake management, endangered species, and tribal trusteeship concerns—matters of central interest in the KPOP.

The dilemma for the Department and the Tribes, of course, is that, on the one hand, premature disclosure of the incomplete BIA work or reliance solely on the USGS work will be prejudicial to the Adjudication; on the other hand, proceeding now without the benefit of the BIA work will later pit Interior agencies against one another and, again, could be prejudicial to the Adjudication.

The precedent and the solution. The Tribes believe the solution lies in following the example set a year ago when difficult and potentially controversial issues were presented but did not require immediate resolution. That example includes taking advantage of a non-critical water year to allow implementation of an interim water management plan for the current water year. This would allow the final KPOP decisions to be postponed, the BIA work to proceed to completion, the KPOP to be based on the full range of relevant scientific information and analysis, the potential conflict among agencies to be avoided, and controversy to be minimized.

Fortunately this solution is available this year because, like last year, the water supply appears to be well above the critical level. The Natural Resources Conservation Service report for the Klamath Basin puts the snowpack at 94% of normal Basin-wide, and slightly above that for the Upper Klamath Lake watershed in particular, as of February 14.

You may recall that last year at this time the Tribes requested that Reclamation's 1995 interim management plan include a specific articulation of the legal priorities to water use in the Basin. This was felt by the Department to be a difficult request, and it was deferred because the predicted adequacy of the water year rendered unnecessary the application of legal priorities. Similarly, this year the adequacy of the water supply will render unnecessary water allocation decisions based on the USGS and BIA analyses relevant to critical-year management, and the dilemma described above need not be resolved immediately.



Advantages of an interim plan. *Reconciliation of the KPOP and the Adjudication. An interim plan would allow the BIA work to proceed to completion and to be included in the KPOP product. It would avoid compromising Interior's work in the Adjudication and it would avoid the potential intra-departmental conflict. It would also avoid unnecessary risk of prejudice to tribal water rights.

* NEPA compliance. An interim plan would make the NEPA compliance process much easier. There has not even been time for Reclamation to meet its own NEPA commpliance requirements, as illustrated just below. As you know, the KPOP process has allowed only two weeks for preparation of the Environmental Assessment. This is not adequate, even considereing the quantity of information gathered prior to the two week period.

For example, Reclamation's "Indian Trust Asset Policy and NEPA Implementing Procedures" at IV-8 requires analysis of the "full extent of the impacts . . . [on] social and cultural values" of the Tribes. So far, no contacts with the Tribes have been made by Reclamation to allow such an analysis which must go far beyond the fishery data gathered so far in the KPOP process. Similarly, the Tribes have not been provided an opportunity to participate in the preparation of the EA as required by Reclamation's "ITA-4 B." Their participation will apparently be restricted to reviewing the prepared document, while ITA-4 B plainly requires earlier involvement. Attempts to substitute BIA participation for that of the Tribes are not only inconsistent with Reclamation's rules, they have been ineffective. The Tribes are aware that BIA personnel, asked with little

or no notice to provide assistance in this hasty effort, have been unable to respond. Clearly, more time is needed to do this job correctly and deliberately.

Also, the NEPA precedents at the Newlands Project and the Trinity River strongly suggest that an Environmental Impact Statement is appropriate in the KPOP context, as it was in those two situations. The Tribes believe that the KPOP will require an EIS, and they are aware that this belief is shared by others both within and outside the Department.

* Completion and refinement of existing KPOP processes. An interim plan would allow time to refine and complete the KPOP Technical Memo process. Reclamation has frequently and publicly bemoaned the fact that time constraints are preventing it from giving this process the attention it deserves. As you know, the five Tech Memos have been the subject of voluminous comments and critiques. To date Reclamation has had time to reply only with a summary of the comments. There has not been time to explain how this input has been incorporated (or why it has not been incorporated) in the KPOP products. There has been no real exchange or dialogue with the Tribes, water users, or the public to assure that these concerns have been understood and addressed by Reclamation and its Tech Memo consultant CH2MHill.

As just one example of this situation, consider the recent comments of Balance Hydrologics, Inc., who reviewed some of the KPOP Tech Memos on behalf of several groups interested in this process and represented by the Sierra Club Legal Defense Fund.[1] Balance found the Tech Memos did not give it access to information essential to allow it to evaluate for its clients the foundation of the KPOP decision process. For example, Balance was unable to evaluate the computer spreadsheet model that lies at the core of Reclamation's decision making process because there is no description of the model's assumptions available. Only Reclamation and its contractors have this information and it has not been shared.



As a result, there is currently very little public confidence in the outcome of the KPOP process, nor can such confidence be expected. An interim plan would allow more time for the existing data gaps to be filled and for reviewers to be shown that, whether or not the outcome is agreeable to them, all relevant information has been presented and considered in the decision process.

* Internal federal review. An interim plan would also allow for proper internal review within the Department itself. The Tribes expect that Reclamation is hearing loud cries from sister agencies, particularly the BIA, who are asked to review lengthy documents in a very few working days. Such a timetable calls into question the adequacy of the review process.

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[1] These groups include the Klamath Forest Alliance, the Pacific Coast Federation of Fishermen's Associations, the Oregon Natural Resources Council, the California Sportfishing Protection Association, the Salmonid Restoration Federation, the Northcoast Environmental Center, and the Lane County Audubon Society. A copy of Balance's comments has been filed with Reclamation. We would be glad to furnish additional copies at your request.

* Interior's trusteeship obligations. Last, but of greatest importance, is the effect on the Secretary's trust responsibility to the Tribes. The Tribes expect the Secretary to act deliberately and after the most careful consideration to protect their water rights. In the current circumstances a rush to meet a self-imposed decision schedule will very likely compromise the Secretary's ability to discharge this duty and result in prejudice to tribal interests. Indeed, either option chosen from the current dilemma threatens further impairment of the already endangered tribal fishery. There is no need for haste, nor is there a compelling reason to so jeopardize either the Tribes' rights or the Secretary's fidelity to them. This is all the more important in light of the fact, explained in section 2 below, that the narrow question investigated in the USGS work cannot support the broad conclusions being drawn in the KPOP. Proceeding in reliance solely on that work, and in derogation of the Adjudication, is inconsistent with the trusteeship when other courses of action are available.

To summarize this first section, there is no need to rush to resolve the present dilemma presented by potentially conflicting Interior positions. The Tribes respectfully request that the Secretary and the agencies take advantage of the opportunity presented by a non-critical water year to proceed with an interim plan for 1996 and a deliberate review and reconciliation of all the interwoven demands inherent in such an important planning process.



2. <u>The current KPOP foundation, in particular the narrow investigation requested of USGS, does not support the conclusions being drawn from it, and does not justify compromising the Adjudication</u>.

Based on the information available to the Tribes[2] it appears that the KPOP will address, as it must, the important management question of whether Upper Klamath Lake surface elevation management is a useful tool to protect fisheries late in the water year. To date, it appears that the KPOP's answer will be "no." Unfortunately, this answer is based exclusively on a USGS investigation into a different and much narrower question altogether. This section will discuss, with the help of an analogy, the narrowness of the question put to USGS and why the response will not support the broad negative conclusion regarding lake surface elevation as a tool to protect fisheries.

<u>The narrow question, an analogy, and the broad conclusion</u>. One would have thought that the task assigned USGS would include an investigation of whether or not Upper Klamath Lake surface elevation management is a useful tool in promoting fishery well-being, that is, whether limnological mechanisms in the Lake cause surface elevation to be a useful tool toward that end. Such an investigation would have provided important guidance in designing Lake management techniques in the KPOP.

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[2] At this writing the KPOP documents are under internal review within the Department and have not been reviewed by the Tribes. This letter is based on discussions with field personnel during the course of development of the administrative record on which the KPOP documents are presumably based.

Unfortunately that question regarding limnological mechanisms that could promote fisheries – mechanisms that are affected by Lake surface elevation and that, therefore, make Lake surface elevation available as a tool for fishery management—was not assigned. Instead, USGS was only asked an extremely narrow question regarding whether it could readily see, as other investigators had seen, the effects of such mechanisms reflected in a limited data set. The USGS response to that assignment is not adequate, nor was it intended to be adequate, to resolving the broader management question.

> An analogy may be helpful. It is as though the Government is maintaining a garden and must determine the broad question of whether to invest in weeding and fertilizing in the belief that these are useful tools to promote plant productiviety. One would think the Government would simply ask its gardening advisor (USGS) to investigate that broad question by asking, "Are there chemical and biological mechanisms in the garden that make weeding and fertilizing useful tools to promote productivity?"
>
> Unfortunately, instead of asking the broad management question, the Government asks instead the much narrower question, "Is there a readily observable relation between, on the one hand, this data we have collected regarding the amount of weeding and fertilizing of the garden we have done over the last several years and, on the other, this associated data we have collected regarding the success of the garden in those years?"



> The investigator is answering, "I cannot readily observe such a relation. Some years relatively greater amounts of weeding and fertilizing produce relatively small crops. Some years relatively less weeding and fertilizing produce relatively larger crops. Maybe this is because the weather is a more important factor that your weeding and fertilizing."
>
> The Government then reaches the broad conclusion that weeding and fertilizing should not be employed because they are not useful management tools to promote garden productivity.

As the analogy illustrates, the narrow scope of the investigation is not sufficient to support the broad conclusion being drawn from it. It is case of the wrong question being asked or the wrong application of the answer being made. In either event, the outcome is not defensible and it certainly does not warrant compromising the Adjudication of the Tribes' water rights.

Moreover, it would squarely contradict the USGS work if the KPOP were to conclude that there are no linmological mechanisms that make Lake surface elevation a useful tool in fishery protection. The USGS work itself identifies such mechanisms.

For example, the USGS Executive Summary cites at least two such mechanisms in order to explain the occasions when such effects are, indeed, clearly observable. For example, the Summary specifies that "low lake level . . . may have contributed to the high phosphorus concentrations by way of enhanced internal loading" dut to high winds mixing sediment into the water column. (Executive Summary, p. 18 first full ¶.)

Similarly, it is said that "July lake level may have also contributed [to very low dissolved oxygen] by concentrating oxygen demanding material into a smaller water column." (Executive Summary, p. 18, top ¶.)

Moreover, in addition to the mechanisms cited in the USGS Executive Summary, the administrative record contains at least two other mechanisms showing that lake surface elevation must be considered as a fishery management tool. First, low late-season elevations heighten the risk of winter fish kill as snow covers the frozen lake driving dissolved oxygen to lethally low levels. A higher water column reduces this risk.

Second, very low late-season Lake surface elevations increase the risk of being unable to refill the Lake to meet the spawning-season surface elevations required elsewhere in the KPOP. Again, Lake surface elevation is not irrelevant as a management tool.

In sum, the USGS work cannot support, nor was it designed or intended by USGS to support, a KPOP conclusion that Lake surface elevation is not a useful management tool for protecting Upper Klamath Lake fisheries late in the water year. Both the USGS work and the rest of the administrative record contradict such a conclusion.

The salient point is, again, that the current posture of the KPOP proceedings does not warrant taking any steps that jeopardize the Department's position in the Klamath Basin Adjudication, much less steps that wold compromise the Tribes' water rights. Development of a 1996 interim water management plan for the Klamath Project is an appropriate next step for the Department.



Thank you for your consideration of this letter. We look forward to discussing these matters with you.

Very truly yours,

/s/ ELWOOD H. MILLER, JR.
ELWOOD H. MILLER, JR.
Director, Department of
Natural Resources

THE WHITE HOUSE

WASHINGTON

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

I am writing to call your attention to a subject that is of great importance to the American public and to all Federal departments and agencies—the administration of the Freedom of Information Act, as amended (the "Act"). The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration.

For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.

The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. As Vice President Gore made clear in the National Performance Review, the American people are the Federal Government's customers. Federal deparments and agencies should handle request for information in a



customer-friendly manner. The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation.

I therefore call upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General, which is attached.

Further, I remind agencies that our commitment to openness requires more than merely responding to requests from the public. Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure compliance with both the letter and spirit of the Act.

/s/ WILLIAM J. CLINTON

Office of the Attorney General
Washington, D.C. 20530

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

President Clinton has asked each Federal deparment and agency to take steps to ensure it is in compliance with both the letter and the spirit of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The Department of Justice is fully committed to this directive and stands ready to assist all agencies as we implement this new policy.

First and foremost, we must ensure that the principle of openness in government is applied in each and every disclosure and nondisclosure decision that is required under the Act. Therefore, I hereby rescind the Department of Justice's 1981 guidelines for the defense of agency action in Freedom of Information Act litigation. The Department will no longer defend an agency's withholding of information merely because there is "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.

To be sure, the Act accommodates, through its exemption structure, the countervailing interests that can exist in both disclosure and nondisclosure of government information. Yet while the Act's exemptions are designed to guard against harm to governmental and private interests, I firmly believe that these exemptions are best applied with specific reference to such



harm, and only after consideration of the reasonably expected consequences of disclosure in each particular case.

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.

It is my belief that this change in policy serves the public interest by achieving the Act's primary objective —maximum responsible disclosure of government information—while preserving essential confidentiality. Accordingly, I strongly encourage your FOIA officers to make "discretionary disclosures" whenever possible under the Act. Such disclosures are possible under a number of FOIA exemptions, especially when only a governmental interest would be affected. The exemptions and opportunities for "discretionary disclosures" are discussed in the Discretionary Disclosure and Waiver section of the "Justice Department Guide to the Freedom of Information Act." As that discussion points out, agencies can make discretionary FOIA disclosures as a matter of good public policy without concern for future "waiver consequences" for similar information. Such disclosures can also readily satisfy an agency's "reasonable segregation" obligation under the Act in connection with marginally exempt information, *see* 5 U.S.C. § 552(b), and can lessen an agency's administrative burden at all levels of the administrative process and in litigation. I note that this policy is not

intended to create any substantive or procedural rights enforceable at law.

In connection with the repeal of the 1981 guidelines, I am requesting that the Assistant Attorneys General for the Department's Civil and Tax Divisions, as well as the United States Attorneys, undertake a review of the merits of all pending FOIA cases handled by them, according to the standards set forth above. The Department's litigating attorneys will strive to work closely with your general counsels and their litigation staffs to implement this new policy on a case-by-case basis. The Department's Office of Information and Privacy can also be called upon for assistance in this process, as well as for policy guidance to agency FOIA officers.

In addition, at the Department of Justice we are undertaking a complete review and revision of our regulations implementing the FOIA, all related regulations pertaining to the Privacy Act of 1974, 5 U.S.C. § 552a, as well as the Department's disclosure policies generally. We are also planning to conduct a Department-wide "FOIA Form Review." Envisioned is a comprehensive review of all standard FOIA forms and correspondence utilized by the Justice Department's various components. These items will be reviewed for their correctness, completeness, consistency, and particularly for their use of clear language. As we conduct this review, we will be especially mindful that FOIA requesters are users of a government service, participants in an administrative process, and constituents of our democratic society. I encourage you to do likewise at your departments and agencies.



Finally I would like to take this opportunity to raise with you the longstanding problem of administrative backlogs under the Freedom of Information Act. Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies – especially those dealing with high-volume demands for particularly sensitive records—maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem—one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.

It is my hope that we can work constructively together, with Congress and the FOIA-requester community, to reduce backlogs during the coming year. To ensure that we have a clear and current understanding of the situation, I am requesting that each of you send to the Department's Office of Information and Privacy a copy of your agency's Annual FOIA Report to Congress for 1992. Please include with this report a letter describing the extent of any present FOIA backlog, FOIA staffing difficulties and any other observations in this regard that you believe would be helpful.

In closing, I want to reemphasize the importance of our cooperative efforts in this area. The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all Federal agencies as we make government throughout the executive branch more open, more responsive, and more accountable.

/s/ JANET RENO

No. 99-1871

# In the Supreme Court of the United States

NOV 9 2000

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

*v.*

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONERS


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## QUESTION PRESENTED

Whether confidential communications between Indian Tribes and the Bureau of Indian Affairs, in connection with the federal government's performance of its trust responsibility to protect and manage tribal water rights, are "intra-agency" documents that may be protected from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

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# In the Supreme Court of the United States

No. 99-1871

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

*v.*

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 189 F.3d 1034. The decision of the district court (Pet. App. 31a-32a) adopting the findings and recommendation of the magistrate judge is unreported. The findings and recommendation of the magistrate judge (Pet. App. 33a-71a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. A petition for rehearing was denied on December 22, 1999 (Pet. App. 72a-73a). On March 10, 2000, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including April 20, 2000. On April

10, 2000, Justice O'Connor further extended the time for filing to and including May 20, 2000. The petition was filed on May 22, 2000 (a Monday) and was granted on September 26, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

## STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. IV 1998), generally mandates disclosure upon request of records held by an agency of the federal government. Section 552(b), however, identifies several categories of records that are exempt from compelled disclosure. In particular, FOIA Exemption 5, 5 U.S.C. 552(b)(5), authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 protects from compelled disclosure "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). This case primarily involves the application of Exemption 5 to documents that were created outside the government but were provided to federal agency officials at the agency's request



and were used by the government in its internal deliberations.[1]

For purposes of the FOIA, the term "agency" is defined to mean (with exceptions not relevant here) "each authority of the Government of the United States," 5 U.S.C. 551(1), "includ[ing] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency," 5 U.S.C. 552(f)(1) (1994 & Supp. IV 1998). The courts of appeals that have considered the question have uniformly concluded that at least under some circumstances, a document prepared outside the government may qualify as an "intra-agency memorandum[]" within the meaning of Exemption 5. See Pet. App. 21a (Hawkins, J., dissenting) (citing cases). In *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988), three Members of this Court endorsed the approach to Exemption 5 taken by the courts of appeals:

> [T]he most natural meaning of the phrase "intra-agency memorandum" is a memorandum that is addressed both to and from employees of a single agency—as opposed to an "inter-agency memorandum," which would be a memorandum between employees of two different agencies. The problem with this interpretation is that it excludes many situations where Exemption 5's purpose of protecting the Government's deliberative process is plainly applicable. Consequently, the Courts of Appeals have uniformly rejected it, holding the "intra-agency memorandum" exemption applicable to such matters as information furnished by Senators to the Attorney

[1] Six of the seven documents currently at issue fit that description. The seventh was prepared within the agency and was then provided to persons outside the government. See p. 11, *infra*.

General concerning judicial nominations, see *Ryan* v. *Department of Justice*, 199 U. S. App. D. C. 199, 207-209, 617 F. 2d 781, 789-791 (1980), and reports prepared by outside consultants, see *Government Land Bank* v. *GSA*, 671 F. 2d 663, 665 (CA1 1982). It seems to me that these decisions are supported by a permissible and desirable reading of the statute. It is textually possible and much more in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e.g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.

*Id.* at 18 n.1 (Scalia, J., joined by White & O'Connor, JJ., dissenting). The Court in *Julian* did not address the question whether the relevant documents were "inter-agency or intra-agency" records within the meaning of Exemption 5, see *id.* at 11 n.9, since it concluded that the documents would be routinely discoverable in civil litigation and therefore would not be covered by the Exemption in any event, see *id.* at 11-14.

2. This Court has frequently recognized that "Indian tribes occupy a unique status under our law." *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). "Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection." Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998). A central feature of that duty of protection is the trust responsibility of the United States to protect the land, water, and other natural resources of Indian Tribes. See, *e.g.*, *United States* v.



*Cherokee Nation*, 480 U.S. 700, 707 (1987); *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942).

Congress has directed the Secretary of the Interior to "[a]ppropriately manag[e] the natural resources located within the boundaries of Indian reservations and trust lands." 25 U.S.C. 162a(d)(8). Congress has also declared that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government." 25 U.S.C. 3601(2). In addition, Congress has required federal agencies to develop effective processes to permit tribal officers to provide meaningful and timely input in the development of regulatory proposals. 2 U.S.C. 1534(a) (Supp. IV 1998).[2] The Bureau of Indian Affairs (BIA), an agency located within the Department of the Interior (DOI), is the federal agency with primary responsibility for administering land and water held in trust for the Indian Tribes. 25 U.S.C. 1a; 25 C.F.R. subch. H, Pts. 150-181; see *Nevada* v. *United States*, 463 U.S. 110, 127 (1983).

The trust relationship between the United States and the Tribes with respect to Indian resources "is one of the primary cornerstones of Indian law." F. Cohen, *Handbook of Federal Indian Law* ch. 2, § C2a, at 220-21 (1982 ed.). It has been analogized to the relationship existing under a common law trust, with the United States as trustee, the Indian Tribe (or individual Indians) as beneficiary, and the

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[2] Section 1534(a) provides:

> Each agency shall, to the extent permitted in law, develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates.

property and natural resources as the trust corpus. See *Mitchell*, 463 U.S. at 225. Accordingly, this Court has looked to traditional trust doctrine for guidance in defining the scope of the trust responsibility of the United States to Indian Tribes. See, *e.g.*, *Mitchell*, 463 U.S. at 225 & n.30; *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Seminole Tribe*, 316 U.S. at 296.

In November 1993, the Secretary of the Interior directed all bureaus and offices within the Department of the Interior (DOI) to "be[] aware of the impact of their plans, projects, programs or activities on Indian trust resources," and "to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may affect * * * if their evaluation reveals any impact on Indian trust resources." J.A. 53. In April 1994, President Clinton issued a memorandum imposing similar requirements on all executive departments and agencies. J.A. 49-51. In May 1998, the President issued an Executive Order, entitled "Consultation and Coordination with Tribal Governments," that directs federal agencies to "establish regular and meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices" that affect tribal governments. Exec. Order No. 13,084, 63 Fed. Reg. at 27,655.[3]

[3] A new Executive Order issued on November 6, 2000, will take effect 60 days from the date of its issuance (January 5, 2001), at which time Executive Order No. 13,084 will be revoked. See Exec. Order, "Consultation and Coordination with Indian Tribal Governments" §§ 9(c) and 9(d) (Nov. 6, 2000). Like Executive Order No. 13,084, the new Executive Order directs federal agencies to engage in consultation with tribal governments regarding matters of importance to the Tribes. See § 5(a) ("Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."). The Order further provides that "[a]gencies shall respect Indian tribal self-government and sovereignty,



The Secretary's November 1993 directive has been incorporated into the Departmental Manual governing the DOI. The Manual states that "[i]t is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety." J.A. 55. Accordingly, the Manual directs that "[a]s part of the planning process, each bureau and office must identify any potential effects on Indian trust resources" in order to ensure that such effects can "be explicitly addressed in the planning/decision documents." J.A. 57. The Manual further provides that

> [i]n the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s) * * *. Information received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s).

J.A. 57-58.

3. This case primarily involves documents submitted to petitioner BIA by the Klamath Indian Tribes. Pursuant to an 1864 treaty, the Klamath Tribes retain fishing and hunting rights on lands that were previously part of the former

honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments." *Id.* § 3(a).

Klamath Indian Reservation in Oregon. See Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707; *Kimball* v. *Callahan*, 493 F.2d 564, 566 (9th Cir.), cert. denied, 419 U.S. 1019 (1974).[4] In *United States* v. *Adair*, 723 F.2d 1394 (9th Cir.), cert. denied, 467 U.S. 1252 (1984), the court of appeals held that the hunting and fishing rights reserved to the Klamath Tribes by the 1864 treaty carry with them an implied reservation of water rights, "with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights." *Id.* at 1415; see *id.* at 1408-1415. The court in *Adair* explained that

> the right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive. The holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent independent consumptive rights). Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams[']waters below a protected level in any area where the non-consumptive right applies.

*Id.* at 1411 (citation omitted).

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[4] In 1954, the Klamath Indian Reservation in Oregon was terminated pursuant to the Klamath Termination Act, see Act of Aug. 13, 1954, ch. 732, § 1, 68 Stat. 718 (codified at 25 U.S.C. 564). Under the 1954 Act, the Klamath Tribes' reservation lands were disposed of to private parties, individual Indians, and federal agencies, but the Tribes' hunting and fishing rights remained intact. See, *e.g.*, *United States* v. *Adair*, 723 F.2d 1394, 1411-1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); *Kimball*, 493 F.2d at 566-570. In 1986 the Klamath Tribes were restored as a federally recognized tribal entity. See Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (codified at 25 U.S.C. 566 *et seq.*).



4. Although federal reserved water rights for an Indian Tribe derive from and are defined by federal law, determinations regarding the existence and quantity of such reserved water rights may be made in the context of a general stream adjudication in state court, pursuant to the waiver of sovereign immunity in the McCarran Amendment, 43 U.S.C. 666. See, *e.g.*, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976); *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983). The State of Oregon has established a statutory procedure to determine the surface water rights of all claimants in the Klamath River Basin in Oregon. See *United States* v. *Oregon*, 44 F.3d 758, 762-764 (9th Cir. 1994), cert. denied, 516 U.S. 943 (1995). In *United States* v. *Oregon*, the court of appeals held that the waiver of federal sovereign immunity contained in the McCarran Amendment applied to the Oregon proceeding. 44 F.3d at 763-770.

The United States is thus a party to the Oregon adjudication and, in addition to asserting water rights on its own behalf, has an affirmative obligation to assert water rights claims on behalf of the Klamath Tribes. See *United States* v. *White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986); J.A. 34-35. The BIA has therefore engaged in extensive consultation with the Tribes, including the exchange of legal analyses and theories regarding the scope of the claims submitted by the United States on the Tribes' behalf. J.A. 35-36. The Department of Justice, on behalf of the BIA, then submitted claims in the Oregon state adjudication for the benefit of the Klamath Tribes. The adjudication remains pending.

5. The Bureau of Reclamation (BOR), an agency located within the DOI, administers the Klamath Project. The Project uses water from the Klamath River Basin to irrigate more than 200,000 acres in Klamath County, Oregon, and two northern California counties, primarily for agricultural

purposes. Pet. App. 14a, 35a; see *Bennett* v. *Spear*, 520 U.S. 154, 158-159 (1997). In 1995, DOI began efforts to develop the Klamath Project Operations Plan (KPOP or Operations Plan), a long-term operations plan for the Project. *Id.* at 14a-15a, 35a.

In connection with those efforts, DOI entered into a memorandum of agreement (MOA) with the Klamath, Hoopa Valley, Karuk, and Yurok Tribes (collectively Klamath Basin Tribes). See J.A. 59-65.[5] Consistent with the President's memorandum of April 1994 and the Secretary's directive of November 1993 (see p. 6, *supra*), the MOA recognized that "[t]he United States Government has a unique legal relationship with Native American tribal governments." J.A. 59. The MOA further recognized that "[w]ith respect to the development of the KPOP, the government-to-government relationship" between the United States and the Tribes requires "[a]ssessment, in consultation with the Tribes, of the impacts of the KPOP on Tribal trust resources." J.A. 60-61. The MOA observed that "[t]his involvement of the Tribes is a major means of assuring that the development of the KPOP reflects the United States' trust obligations and Tribal rights." J.A. 63.

6. Respondent is a non-profit association consisting primarily of Klamath Project irrigators. In 1996, respondent filed a series of FOIA requests with the BIA, seeking access to all communications between the BIA and the Klamath Basin Tribes regarding water resources issues. Pet. App. 2a-3a, 16a-19a, 37a-38a. The BIA released several documents, but it withheld others as exempt under the attorney-work-product and deliberative-process privileges protected by FOIA Exemption 5. Pet. App. 40a. Plaintiff then brought this action against the DOI and the BIA under 5 U.S.C. 552(a)(4)(B) (1994 & Supp. IV 1998) to compel the release of the documents.

[5] The Hoopa Valley, Karuk, and Yurok Tribes have reservation lands downstream along the Klamath River or other lands held in trust in California. See, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973). Those Tribes have an interest in the operation of the Klamath Project because water flows in the River affect hunting and fishing by those Tribes. See Pet. App. 2a.



By the time the district court ruled in this case, seven documents remained in dispute. See Pet. App. 3a, 41a-42a. Three of the documents specifically address issues involved in the development of the KPOP; three were intended to assist the government in representing the Tribes in the Oregon adjudication; and the seventh addresses both proceedings. See *id.* at 41a-49a; J.A. 40-48. Six of the documents were prepared by the Klamath Tribes or their representative and were submitted to the BIA (or, in one instance, to DOI's Regional Solicitor, see Pet. App. 45a) at the agency's request. See Pet. App. 41a-49a; J.A. 40-48. The seventh document was prepared by a BIA official and was provided to attorneys for the Klamath and Yurok Tribes. Pet. App. 43a-44a; J.A. 41-43.[6]

The case was referred to a magistrate judge, who recommended that the government's summary judgment motion be granted on the ground that the documents in question are protected by Exemption 5. Pet. App. 33a-71a. As an initial matter, the magistrate judge concluded that all of the documents satisfied the threshold requirement for protection under Exemption 5—namely, that they are "inter-agency or

[6] The Ninth Circuit has repeatedly held that the Yurok Tribe has fishing rights in the Klamath Basin. See, *e.g.*, *Parravano* v. *Babbitt*, 70 F.3d 539, 545-546 (1995), cert. denied, 518 U.S. 1016 (1996). Although no court has adjudicated the Yurok Tribe's water rights, the United States has consistently taken the position that under the reasoning of *Adair* and other precedents of the Ninth Circuit and this Court, the Tribe has in-stream flow rights sufficient to support its fishing rights.

intra-agency memorandums or letters." The magistrate judge explained:

> [A]ll the documents in question qualify as inter-agency or intra-agency documents under the "functional test". All the documents played a role in the agency's deliberations with regard to the current water rights adjudication and/or the anticipated [KPOP]. Most of the documents were provided to the agency by the Tribes at the agency's request. Disclosure of these documents would expose the agency's decision-making process and discourage candid discussion within the agency undermining the agency's ability to function.

*Id.* at 59a.

The magistrate judge further concluded that all of the documents are protected by an applicable privilege and therefore "would not be available by law to a party * * * in litigation with the agency." Specifically, the magistrate judge found that all of the documents were covered by the deliberative-process privilege, Pet. App. 56a-61a, and that two of the documents (involving the Oregon adjudication) were covered by the attorney-work-product privilege as well, *id.* at 61a-65a. The district court adopted the findings and recommendation of the magistrate judge. *Id.* at 31a-32a.

7. The court of appeals reversed. Pet. App. 1a-30a. The court acknowledged that the District of Columbia Circuit has adopted a "functional" approach to Exemption 5, under which a document generated outside the government may under some circumstances be regarded as an "intra-agency" memorandum. *Id.* at 6a-8a; see pp. 3-4, *supra*. The court declined, however, to decide whether that approach to Exemption 5 is appropriate. *Id.* at 8a. Rather, the court found it dispositive that "the Tribes with whom the Department has a consulting relationship have a direct interest in



the subject matter of the consultations. The development of the KPOP and the Oregon water rights adjudication will affect water allocations to the Tribes as well as those to members of the Association." *Ibid.* The court concluded that because "the matters with respect to which [DOI] sought advice were matters in which the Tribes had their own interest and the communications presumptively served that interest," *id.* at 9a, the Tribes' submissions to the BIA could not properly be regarded as "inter-agency or intra-agency" documents, *id.* at 10a. The court stated that "[t]o hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the [DOI]." *Ibid.*

Judge Hawkins dissented. Pet. App. 11a-30a. He explained:

> Where the Bureau and Department are, by law, required to represent the interests of Indian Tribes, the majority's holding stands as a barrier to that representation. The majority implies that status as a federally recognized Indian Tribe, and the U.S. government's trust responsibilities to the Tribes, create not a cooperative, but an adversarial relationship between the government and the Tribe, and thus FOIA can be used to destroy any opportunity for "open and honest" consultation between them. * * * I simply cannot agree with a notion I think so fundamentally wrong.

*Id.* at 12a-13a. Judge Hawkins also concluded that "[t]he affidavits from Department and Bureau employees, accepted by the court below, confirm that these communications spring from a relationship that remains consultative rather than adversarial, a relationship in which the Bureau and Department were seeking the expertise of the Tribes, rather than opposing them." *Id.* at 25a-26a. He observed as well that the majority's conception of the relationship between

the Tribes and the agency in this case "fails to recognize or address that at least four of the seven documents were used by the Bureau and the Department to prepare to represent the Tribes' claims in the Oregon water rights adjudication—not a proceeding which either the Bureau, or the Interior Department, has the authority to 'resolve.'" *Id.* at 23a n.4.

## SUMMARY OF ARGUMENT

Under the court of appeals' decision, federal agencies will be compelled to disclose communications from Indian Tribes bearing on the United States' management and protection of tribal trust resources, notwithstanding the established principle that a trustee may not reveal information provided by the beneficiary when to do so would disserve the beneficiary's interests. Neither the text, the history, nor the purposes of the FOIA support that result.

I. In enacting Exemption 5 of the FOIA, Congress recognized the government's substantial interest in preserving the confidentiality of its deliberative processes. The courts of appeals have consistently held that documents submitted by outside consultants may properly be treated as "inter-agency or intra-agency memorandums or letters" within the meaning of Exemption 5 if they play essentially the same role in the agency's decisionmaking process as documents prepared by an agency employee.

That approach is consistent with established principles of FOIA administration. Since release of documents prepared by outside consultants may cause the same harms as disclosure of agency-generated records, treating the two similarly comports with this Court's repeated emphasis upon the need for rules of FOIA administration that accommodate the practical exigencies of government. That approach also lessens the risk that the FOIA will be used to circumvent discovery rules to obtain materials that would ordinarily be privileged in civil litigation. Protection of such records also



ensures that federal officials who are assigned trust or representational duties with respect to persons outside the government can faithfully comply with the rules that govern trustees and representatives generally.

In determining whether documents generated outside the government may properly be regarded as "intra-agency memorandums," the courts of appeals have focused on whether the source of the relevant records is an appropriate person for the agency to consult with respect to the matter to which the documents pertain. That inquiry turns largely on (a) whether a basic congruence of interests exists between the agency and the source of the documents, or (b) whether the agency is obligated by law or has reasonably undertaken to accord a special duty of loyalty, protection, or respect to the person who created the documents. This Court has also suggested that the "intra-agency" character of particular records may be informed in part by whether the documents are intended for the internal assistance or guidance of agency officials (as distinguished from documents that articulate rules of conduct binding on persons outside the government). Those criteria are satisfied in this case.

II. Compelled disclosure of documents like those at issue here would impair the United States' performance of its trust responsibilities. If the prospect of disclosure caused Tribes to be less thorough or candid in their submissions, federal officials will lack information bearing on their ability to manage and protect trust property. And even if there were somehow grounds to believe that the content of tribal submissions would be unaffected by the prospect of public disclosure, compelled release would impair the agency's performance of its assigned functions, because protection of the beneficiary's confidences is itself a significant component of the government's trust responsibilities. Such disclosures do not simply harm the Tribes and tribal members; they

disserve the substantial public and governmental interest in the United States' fulfillment of its trust obligations.

Although a private party's financial or similar stake in the outcome of a government decision may sometimes preclude the application of Exemption 5 to its submissions, the Tribes' "direct interest" in trust property cannot have that effect. To the contrary, a trustee's distinct responsibilities—including the duty to maintain confidentiality where disclosure would harm the beneficiary's interests—run precisely to those persons having an interest in the trust corpus. Far from supporting a rule of compelled disclosure, an Indian Tribe's "direct interest" in the trust property makes it a particularly appropriate "consultant" with respect to the BIA's performance of its trust responsibilities.

Contrary to the court of appeals' holding, the tribal submissions in this case cannot reasonably be characterized as "ex parte communications" to the federal government. The error in the court's analysis is particularly clear with respect to the documents pertaining to the Oregon adjudication, where the federal government does not act as decisionmaker but instead presents claims (on its own behalf and on behalf of Tribes) for ultimate resolution by state officials. The court's decision places the Klamath Tribes at a distinct disadvantage vis-a-vis other claimants in the Oregon adjudication, who may continue to assert all available privileges with respect to documents passing between themselves and their own representatives. The court's "ex parte communications" rationale is also erroneous with respect to the documents prepared in connection with the KPOP. Those documents were submitted to (or created by) the BIA in carrying out the United States' obligations as trustee for the tribal water rights potentially affected by the operation of the Klamath Project. The fact that DOI must also take into account the interests of other water users in exercising ultimate decisionmaking authority with respect to the KPOP



does not alter the duty of loyalty to the Tribes owed by the agency acting in its fiduciary role.

## ARGUMENT

The documents at issue in this case were intended to assist the Bureau of Indian Affairs in performing its responsibility to manage and protect tribal water rights held in trust by the United States. "It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987); accord, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983) ("[A] fiduciary relationship necessarily arises when the Government assumes * * * elaborate control over * * * property belonging to Indians."); see *id.* at 224-226. The government's "conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942).

Under established trust principles, "[t]he trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts § 170 cmt. s (1959). The "direct interest" test announced by the court of appeals permits use of the FOIA as a means by which federal officials may be compelled to breach that obligation on a regular basis. Because an Indian Tribe will always have a "direct interest" in the government's performance of its fiduciary responsibilities with respect to resources that the United States holds in trust for the Tribe, the court of appeals' construction of Exemption 5 effectively compels federal officials to violate a duty of confidentiality that has traditionally been regarded as integral to any trust relationship. Absent the clearest

evidence of congressional intent, the FOIA should not be read to require such a deviation from traditional fiduciary standards.

As we explain below, no such evidence exists. To the contrary, the text and history of the FOIA, and judicial decisions interpreting the Act, reflect a recognition that FOIA's general rule of agency disclosure should not be applied in so rigid a fashion as to subvert the effective performance of governmental functions.

## I. EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT MAY UNDER APPROPRIATE CIRCUMSTANCES BE INVOKED TO PROTECT FROM COMPELLED DISCLOSURE DOCUMENTS CREATED BY PERSONS OUTSIDE THE FEDERAL GOVERNMENT

### A. The History And Purpose Of Exemption 5 Support Its Application To Documents Created Outside The Government When Compelled Disclosure Would Impair The Agency's Decisionmaking Processes And Its Performance Of Representational Functions

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. IV 1998), generally mandates disclosure upon request of records held by an agency of the federal government. Section 552(b), however, provides that the Act "does not apply to" nine enumerated categories of records. Although the FOIA reflects "a general philosophy of full agency disclosure," *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)), this Court "has recognized that the statutory exemptions are intended to have meaningful reach and application," *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Because "Congress realized that legitimate governmental and private interests could be harmed by



release of certain types of information," it provided "specific exemptions under which disclosure could be refused." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982). Congress thereby sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966); see *John Doe Agency*, 493 U.S. at 152.

FOIA Exemption 5, 5 U.S.C. 552(b)(5), authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 "codifies the traditional common law privileges afforded certain documents in the context of civil litigation and discovery." *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 490 (1982); see *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) ("Exemption 5 simply incorporates civil discovery privileges."); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) ("[I]t is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context."). The House Report accompanying the FOIA explained the purpose of Exemption 5 as follows:

> Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before

it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. [The Act] exempts from disclosure material "which would not be available by law to a private party in litigation with the agency." Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public.

H.R. Rep. No. 1497, *supra*, at 10. The Senate Report is to the same effect. See S. Rep. No. 813, *supra*, at 9.

The Committee Reports' emphasis on the need for frank exchanges of ideas within the government suggests a particular focus on the "deliberative process" privilege—a privilege unique to the government that protects "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Sears, Roebuck*, 421 U.S. at 150 (quoting *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd *sub nom. V.E.B. Carl Zeiss* v. *Clark*, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967)); see also *EPA* v. *Mink*, 410 U.S. 73, 86 (1973) ("Congress intended [in Exemption 5] to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions . . . are privileged from inspection.'") (quoting *Kaiser Aluminum & Chem. Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (Reed, J.)). As the Court observed in *Weber Aircraft*, the legislative history of Exemption 5 "recognizes a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations." 465 U.S. at 802. In addition to



documents used in internal agency deliberations, however, Exemption 5 protects materials covered by the attorney-client and attorney-work-product privileges. See S. Rep. No. 813, *supra*, at 2 (materials protected by Exemption 5 "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties"); *FTC* v. *Grolier, Inc.*, 462 U.S. 19 (1983) (work product); *Sears, Roebuck*, 421 U.S. at 154-155 (same).

2. The courts of appeals have frequently considered the status of records that were submitted by consultants or others outside an agency but that played essentially the same role in the agency's decisionmaking process as documents prepared by an agency employee. The courts have consistently held that such documents were properly treated as "inter-agency or intra-agency memorandums" or letters within the meaning of Exemption 5. See, *e.g.*, *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168, 170 (D.C. Cir. 1997); *Formaldehyde Inst.* v. *Department of Health & Human Servs.*, 889 F.2d 1118, 1122-1125 (D.C. Cir. 1989); *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-791 (D.C. Cir. 1980); *Hoover* v. *United States Dep't of the Interior*, 611 F.2d 1132, 1137-1138 (5th Cir. 1980); *Lead Indus. Ass'n* v. *OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); *Wu* v. *National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972); *Soucie* v. *David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); cf. *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1159-1162 (D.C. Cir. 1987) (applying same principle to discovery request in administrative adjudication), cert. denied, 485 U.S. 977 (1988).

Those consistent rulings of the courts of appeals are supported by the background of Exemption 5. When Congress expanded the language of Exemption 5 beyond the original Senate proposal that would have limited the Exemption to documents "dealing solely with matters of law and policy," it

did so in direct response to concerns expressed by government witnesses who testified at congressional hearings. See *Mink*, 410 U.S. at 90-91 & nn. 17-18. Those witnesses recommended, *inter alia*, that Exemption 5 should incorporate the privilege recognized in *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), which held that statements furnished by outside parties to aircraft safety investigators are privileged. See *Weber Aircraft*, 465 U.S. at 803 n.22 (citing *Administrative Procedure Act: Hearings Before the Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 196, 206, 366-367, 418 (1965)).

In *Weber Aircraft*, the requester argued that "intra-agency memorandums or letters" cannot include statements made by civilians to Air Force personnel. 465 U.S. at 798 n.13. The Court did not resolve the question, however, because the material at issue included only statements by Air Force personnel. *Ibid.* However, *Machin* itself involved statements furnished by persons outside the government. See *Machin*, 316 F.2d at 339. Moreover, the House Report on the FOIA stated, in reference to Exemption 5, that "a Government agency cannot always operate effectively if it is required to disclose documents or information which it has *received or* generated before it completes the process of awarding a contract or issuing an order, decision or regulation." H.R. Rep. No. 1497, *supra*, at 10 (emphasis added). The reference to documents "received" by an agency reinforces the conclusion that materials submitted by consultants or others outside the agency are protected by Exemption 5 in appropriate circumstances.

In *Soucie*, the District of Columbia Circuit explained why documents submitted by a person outside the agency as part of the agency's internal deliberative processes are properly protected by Exemption 5 where a recognized privilege applies:



> The rationale of the exemption for internal communications indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it.

*Soucie*, 448 F.2d at 1078 n.44.[7]

In 1974, Congress substantially amended the FOIA to address perceived deficiencies in the procedures by which the Act had been administered. See Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561; H.R. Rep. No. 876, 93d Cong., 2d Sess. 2 (1974) (explaining that the amendments "seek[] to strengthen the procedural aspects of the [FOIA] by several amendments which clarify certain provisions of the Act, improve its administration, and expedite the hand-

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[7] If Exemption 5 were inapplicable to all documents that circulate outside an "agency," the Exemption could not be used to protect advisory memoranda prepared for the President himself and retained in agency files, since the President is not a FOIA "agency." See *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992) (President is not an "agency" within the meaning of 5 U.S.C. 551(1)); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (notes prepared by an Assistant to the President are not "agency records" subject to the FOIA); pp. 24-25 & note 8, *infra*. Such a reading of Exemption 5 would be both bizarre on its face and squarely inconsistent with the Court's disposition of *EPA* v. *Mink*, 410 U.S. 73 (1973). In *Mink* the Court considered the application of (*inter alia*) Exemption 5 to documents prepared and submitted to the President by agency officials at the President's direction. See *id.* at 76-77. The Court found it "beyond question * * * that all of the documents involved in this litigation are 'inter-agency or intra-agency' memoranda or 'letters' that were used in the decisionmaking processes of the Executive Branch." *Id.* at 85.

ling of requests for information from Federal agencies in order to contribute to the fuller and faster release of information"). The legislative history of those amendments reflects Congress's general approval of the manner in which courts had construed the Act's substantive provisions. Thus, the Senate Report stated that "there have been over 200 court cases involving the Act. From these cases has grown a full body of case law, resolving ambiguities and settling upon interpretations generally consistent with the spirit of disclosure reflected by the passage of the FOIA and with the specific intent of Congress in drafting the law." S. Rep. No. 854, 93d Cong., 2d Sess. 7 (1974).

*Inter alia*, the 1974 amendments defined the term "agency" to "include[] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the executive Office of the President), or any independent regulatory agency." Pub. L. No. 93-502, § 3, 88 Stat. 1564 (currently codified at 5 U.S.C. 552(f)(1)). The Conference Report stated that

> [w]ith respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in *Soucie* v. *David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 15 (1974).[8] The Senate Report also expressed approval of the *Soucie* court's

[8] In *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), the Court relied on that passage of the 1974 Conference Report in holding that telephone notes prepared by Henry Kissinger while serving as Assistant to the President were not "agency records" within the meaning of the FOIA. See note 7, *supra*.



construction of the term "agency." See S. Rep. No. 854, *supra*, at 33. Congress's express endorsement in 1974 of that aspect of *Soucie*, together with its general approval of prior judicial decisions construing the statutory exemptions, further reinforces the soundness of the *Soucie* court's determination that a document prepared by outside consultants could under appropriate circumstances "be treated as an intra-agency memorandum of the agency which solicited it." 448 F.2d at 1078 n.44.[9]

### B. Construing The Term "Intra-Agency Memorandums Or Letters" To Cover Certain Documents Submitted By Persons Outside The Government Is Consistent With Established Principles Of FOIA Administration

Established principles of FOIA administration support the consistent holdings of the courts of appeals that documents created outside the government may, under appropriate circumstances, be withheld under Exemption 5. That approach accommodates the practical need of government to obtain advice and expertise from outside sources; it prevents the use of the FOIA to circumvent established discovery privileges; and it ensures that the government can perform in the normal manner functions (such as trust or other representational functions) that have traditionally entailed a duty of confidentiality.

1. This Court has emphasized that the FOIA should be construed in a practical manner designed to establish work-

[9] Congress reenacted the definition of "agency" again in 1996, again without overruling or expressing any disapproval of what was by then a substantial body of precedent (cited at pp. 21, *supra*) holding that documents received by an agency from persons outside the government who serve in a governmentally conferred capacity are properly regarded as "intra-agency memorandums or letters." See Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 3, 110 Stat. 3049.

able rules. In *John Doe Agency*, for example, the Court held that Exemption 7 (5 U.S.C. 552(b)(7)), which governs information compiled for law enforcement purposes, "is not to be construed in a nonfunctional way." 493 U.S. at 157. This Court observed that it "consistently has taken a practical approach when it has been confronted with an issue of interpretation of the Act. [The Court] has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure." *Ibid.* See also, *e.g.*, *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776-780 (1989); *FBI* v. *Abramson*, 456 U.S. 615, 623-629 (1982); *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599-602 (1982).

Consistent with this Court's emphasis upon the need to accommodate the practical exigencies of government, the courts of appeals in applying Exemption 5 have recognized that public disclosure of documents created outside the federal government, and then provided to agency officials at the agency's request or as part of an established relationship, may cause the same harms as public disclosure of agency-generated records. The District of Columbia Circuit has observed that "[i]n the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of the deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions." *Ryan*, 617 F.2d at 789-790. The use of outside consultants is particularly appropriate in situations where some form of specialized expertise is not readily available within the federal government. "If it is to effectively deliberate, an agency may need or want to 'enlist the help of outside experts skilled at unraveling [the] knotty



complexities' of 'problems outside their ken.'" *Public Citizen*, 111 F.3d at 171 (quoting *CNA Fin. Corp.*, 830 F.2d at 1162). That expertise will be more difficult to obtain if a prospective consultant cannot be assured the same degree of confidentiality as would an agency employee. See *Soucie*, 448 F.2d at 1078 n.44 (explaining that "[t]he rationale of the exemption for internal communications" applies to some documents created outside the agency because "[t]he Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity").

This Court employed a similar mode of analysis in *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989). The Court held in that case that the Federal Advisory Committee Act (FACA) did not apply to consultations between the Justice Department and the American Bar Association's Standing Committee on Federal Judiciary regarding potential nominees for federal judgeships. The Court acknowledged that "a literalistic reading of [the relevant FACA provision] would bring the Justice Department's advisory relationship with the ABA Committee within FACA's terms," but it concluded that "[a] literalistic reading * * * would catch far more groups and consulting arrangements than Congress could conceivably have intended." *Id.* at 463-464. The Court also explained that a narrow construction of the Act would avoid the constitutional difficulties that a broader reading would entail. *Id.* at 465-466.[10] Like the

[10] We do not contend that compelled disclosure of the documents at issue in this case would violate the Constitution. As we explain below, however, compelled release of tribal submissions bearing on the United States' performance of its trust responsibilities would cause the government to depart drastically from established fiduciary standards. The prospect of such deviations from traditional practice is itself a basis for judicial caution.

courts of appeals that have given a "functional" reading to the introductory language of Exemption 5, this Court in *Public Citizen* declined, in the absence of clear evidence of congressional intent, to permit the FACA's use as a means of sweeping intrusion on the government's ability to obtain confidential advice and expertise from outside consultants.

2. This Court has "consistently rejected * * * a construction of the FOIA" under which parties could "obtain through the FOIA material that is normally privileged." *Weber Aircraft*, 465 U.S. at 801. Such an interpretation "would create an anomaly in that the FOIA could be used to supplement civil discovery." *Ibid.* An unduly narrow construction of the term "intra-agency," however, would have precisely that effect. In the instant case, for example, both the magistrate judge and the district court concluded that the seven documents at issue are protected by the deliberative process and/or attorney-work-product privilege. See p. 12, *supra*. The court of appeals did not disagree with or even address that holding, but it nevertheless ordered that the documents be released, on the ground that the documents did not fall within the threshold description of "inter-agency or intra-agency memorandums or letters." That approach cannot be squared with this Court's consistent practice of construing such threshold descriptions of the types of records that are potentially eligible for protection under a particular FOIA exemption in a manner that guards against the type of harm that the substantive standard for withholding under that exemption was intended to prevent. See, *e.g.*, *John Doe Agency*, 493 U.S. at 478 (Exemption 7); *Abramson*, 456 U.S. at 628-629 (Exemption 7); *Washington Post*, 456 U.S. at 601 (Exemption 6).

3. This Court has consistently expressed "reluctance to construe the FOIA as silently departing from prior long-standing practice." *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 154 (1980) (citing



*Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 22 (1974), and *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 237 (1978)). The FOIA is intended to cast light on existing government practices; it should not be interpreted and applied so as to compel federal agencies to perform their assigned substantive functions in other than the normal manner. In some instances, however, a requirement that information obtained from outside the government must be publicly disclosed would alter the essential character of the underlying agency function. Where (for example) federal officials are assigned trust or representational duties with respect to persons outside the government, it should ordinarily be assumed that those officials will be guided by the same principles that apply to trustees or representatives generally. If performance of such a function would ordinarily entail a duty of confidentiality, the FOIA should not lightly be construed to require the relevant federal officials to breach that obligation. See pp. 36-37, *infra*.

For that reason, the interpretation of Exemption 5 adopted by the court of appeals has potentially serious adverse implications for cases in which federal attorneys represent individual current and former federal employees who have been sued in their personal capacities. See 28 C.F.R. 50.15(a) (authorizing Department of Justice representation in specified circumstances of current and former federal employees sued in their individual capacities). Department of Justice regulations provide that in such cases "[a]ny adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee." 28 C.F.R. 50.15(a)(3); see *In re Grand Jury Supoena Duces Tecum*, 112 F.3d 910, 921 n.10 (8th Cir.) ("In such a case, the government

attorney enters into a personal attorney-client relationship with the individual defendant, and the usual privilege applies."), cert. denied, 521 U.S. 1105 (1997). A military defense attorney is subject to a similar duty of confidentiality. See Rule for Courts-Martial 502(d)(6) cmt. B ("Defense counsel must * * * represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize."); Mil. R. Evid. 502 (recognizing lawyer-client privilege).

Because the individual employee or service member represented by a government lawyer has an obvious "direct interest" (Pet. App. 8a) in government counsel's performance of his representational function, the court of appeals' decision casts significant doubt on the applicability of Exemption 5 to communications between the attorney and client. To construe Exemption 5 as excluding such materials from protection would plainly be at odds with Congress's evident intent to prevent use of the FOIA to circumvent established discovery privileges. Where federal officials are assigned by law to perform representational functions on behalf of persons outside the government, the FOIA should not be read to require substantial deviation from the manner in which those functions are traditionally performed.

4. a. In defining the circumstances under which documents generated outside the government may properly be regarded as "intra-agency memorandums or letters," the courts of appeals have typically focused on whether the source of the relevant records is an appropriate person for the federal government to consult with respect to the matter to which the documents pertain. In *Public Citizen*, the court of appeals held that Exemption 5 applied to communications between the National Archives and former President Bush, pursuant to the Presidential Records Act of 1978, 44 U.S.C. 2201 *et seq.*, concerning the appropriate disposition of the former President's records. 111 F.3d at 170-172. The court



stated that "[c]onsultations under the Presidential Records Act are precisely the type that Exemption 5 was designed to protect." *Id.* at 171. It explained that an agency may sometimes require the assistance of outside experts and that "[t]he former President clearly qualifies as an expert on the implications of disclosure of Presidential records from his administration." *Ibid.*

In determining whether a party may appropriately be treated for these purposes as a confidential consultant to agency officials, two criteria are especially significant. The first is whether a basic congruence of interests exists between the agency and the putative consultant. The second is whether the agency is obligated by law or has reasonably undertaken to accord a special duty of loyalty, protection, or respect to the person who created the documents.[11] In

[11] Courts have applied a similar standard in addressing the question whether an agency, by disclosing the contents of documents to selected persons outside the government, waives any privilege against general disclosure that might otherwise be available. The analysis in such cases has focused on whether disclosure to a particular recipient serves legitimate governmental interests that would not be served by disclosure to the public at large. Compare *Cooper* v. *Department of the Navy*, 558 F.2d 274, 278 (5th Cir. 1977) ("such limited disclosures to proper outside persons as are necessary to carry out effectively a purpose for assembling a governmental report in the first place do not waive the privilege"); *Badhwar* v. *United States Department of Air Force*, 629 F. Supp. 478, 480-481 (D.D.C. 1986) (applying *Cooper* standard), aff'd, 829 F.2d 182 (D.C. Cir. 1987), with *Education/Instruccion, Inc.* v. *United States Department of Housing and Urban Development*, 471 F. Supp. 1074, 1081 (D. Mass. 1979) ("at least in those circumstances where an authorized disclosure is made to a non-federal party and such disclosure is not necessary to effect the purposes of the document, any claim of an exemption under [Exemption] 5 is waived"); cf. *Aviation Consumer Action Project* v. *Washburn*, 535 F.2d 101, 107-108 (D.C. Cir. 1976) (requested reports were "intra-agency memorandums" within the meaning of Exemption 5, notwithstanding their release to an advisory committee established pursuant to the Federal Advisory Committee Act).

*Public Citizen*, for example, the requisite congruence of interests and duty of respect and deference were established both by the former President's prior service as Chief Executive and by the Presidential Records Act itself, which mandated consultation with the former President.

b. This Court's decision in *Federal Open Market Committee* v. *Merrill*, 443 U.S. 340 (1979), identifies an additional consideration relevant to the question whether particular documents are "intra-agency" records within the meaning of Exemption 5. The Court held in that case that Domestic Policy Directives prepared by the Federal Open Market Committee (FOMC) were covered by Exemption 5. The Directives set forth the Committee's instructions to the Account Manager of the System Open Market Account regarding the manner in which the Account's assets are to be managed. *Id.* at 344-346. In analyzing the application of Exemption 5 to the Policy Directives, the Court first explained:

> There can be little doubt that the FOMC's Domestic Policy Directives constitute "inter-agency or intra-agency memorandums or letters." FOMC is clearly an "agency" as that term is defined in the Administrative Procedure Act. 5 U.S.C. §§ 551(1), 552(e). And the Domestic Policy Directives are essentially the FOMC's written instructions to the Account Manager, a subordinate official of the agency. These instructions, although possibly of interest to members of the public, are binding only upon the Account Manager. The Directives do not establish rules that govern the adjudication of individual rights, nor do they require particular conduct or forbearance by any member of the public. They are thus "intra-agency memorandums" within the meaning of Exemption 5.



*Id.* at 352-353. The Court's analysis suggests that the "intra-agency" character of particular records may be informed in part by whether the documents are intended for the internal assistance or guidance of agency officials (as distinguished from documents that articulate rules of conduct binding on persons outside the government).[12]

The records at issue in this case satisfy both those criteria and are therefore "intra-agency memorandums or letters" within the meaning of Exemption 5. As we explain below, because the United States holds tribal lands and natural resources in trust for their benefit, the Tribes and the government share a basic congruence of interests regarding the protection and management of the relevant property. Moreover, the United States' acceptance of trust responsibilities for tribal property logically and historically entails a special duty of loyalty and respect. Finally, the documents are intended to assist federal officials in the performance of their duties and do not purport to establish norms binding on any person outside the government. The Tribes are therefore particularly appropriate "consultants" with respect to the BIA's performance of its trust responsibilities.

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[12] The Court's analysis in *Federal Open Market Committee* is consistent with the more general principle that the FOIA should be applied in a manner that prevents the development of "secret law." See *Sears, Roebuck*, 421 U.S. at 152-153. That concern will rarely if ever be implicated by withholding of documents created outside the government, since those submissions (unless and until expressly endorsed by the responsible government officials) cannot be thought to "constitute the 'working law' of the agency." *Id.* at 153.

## II. THE DOCUMENTS AT ISSUE IN THIS CASE ARE PROPERLY TREATED AS "INTRA-AGENCY MEMORANDUMS OR LETTERS" WITHIN THE MEANING OF EXEMPTION 5

### A. Compelled Disclosure Of Documents Like Those At Issue In This Case Would Impair The United States' Performance Of Its Trust Responsibilities

1. As we explain above (see pp. 4-6, *supra*), the United States in managing and protecting tribal property acts in a fiduciary capacity, and its duties to the Tribe concerned are largely comparable to those of a private trustee. Pursuant to that trust responsibility and various Executive Branch directives, federal agencies have long consulted with Indian Tribes to obtain technical information, legal analysis, or tribal perspectives that may assist in the protection of the Tribes' trust resources. In order properly to perform its functions, the government must receive candid, unfiltered communications from the Tribes concerning issues that bear on the management and protection of trust resources. Under the court of appeals' decision, however, Indian Tribes will face a Hobson's choice: they may keep from their own representative important litigation or policy information that is necessary to the effective performance of the government's trust responsibilities, or they may disclose that information to the trustee and face a substantial risk of public disclosure. In either event, the government's ability to perform its assigned functions will be greatly impaired.

1. The ability of the United States to receive candid advice and information from Tribes is integral to the government's performance of its trust responsibilities.[13] Consistent

[13] For over half a century, federal policy has favored a broad right of tribal self-government and self-determination. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 553 (1974) (explaining that "Congress in 1934



with that understanding, DOI's Departmental Manual mandates consultation with Tribes whenever their trust resources may be affected by the Department's actions. J.A. 55, 57-58. The Manual further provides that "[i]nformation received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position." J.A. 58.

The prospect of public disclosure would adversely affect the nature of the Tribes' submissions to federal officials regarding the management of trust resources. For example, in some instances, a Tribe or individual Indian beneficiary

determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies" because "[t]he overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests."); *Oklahoma Tax Comm'n* v. *Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (relevant federal statutes "reflect Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development") (internal quotation marks omitted); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62 (1978). In the Indian Self-Determination and Education Assistance Act, for example,

> Congress declare[d] its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. 450a(b). Consultation with Tribes regarding the United States' performance of its trust responsibilities substantially furthers the federal policy favoring tribal self-government and self-determination, by ensuring that tribal perspectives are fully considered by federal officials charged with managing and protecting property held in trust for the Tribes.

might choose to forgo such communications altogether. In other instances, they might decline to make submissions in writing, thereby undermining the accuracy, comprehensiveness, and efficiency of communications. Compare *Hickman* v. *Taylor*, 329 U.S. 496, 511 (1947) (quoted at note 18, infra) ("Were such material open to opposing counsel on mere demand, much of what is now put in writing would remain unwritten."). And even where communications (or written communications) would not be chilled altogether, the prospect of mandatory public disclosure could be expected to cause tribal submissions to be less candid, less nuanced, and consequently less helpful to federal officials in carrying out the government's trust responsibilities. Federal officials would be deprived of critical expertise and the beneficiaries' perspective concerning trust resources that are vital to the well-being of the Indians; they might be forced to duplicate pertinent research at government expense; and their ability to manage and protect the trust property would be compromised. That prospect directly implicates the interests that Exemption 5 is intended to protect. Compare *Sears, Roebuck*, 421 U.S. at 150 (Exemption 5 reflects the concern that "the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public; and the decisions and policies formulated would be the poorer as a result") (internal quotation marks omitted).

2. Even if there were somehow grounds for believing that the content of tribal submissions to the federal government would be unaffected by the prospect of public disclosure, compelled release nevertheless would impair the BIA's performance of the functions assigned to it. As we explain above, a "trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts § 170 cmt. s



(1959). If their submissions to the BIA were subject to mandatory disclosure under the FOIA, Tribes and individual Indians who continue to provide the government with advice and information concerning trust resources might receive representation that falls short of traditional fiduciary standards, since federal officials will be unable to guarantee the confidentiality that a trust relationship ordinarily entails. Indiscriminate public disclosure of a Tribe's communications would itself be a significant breach of the trustee's duties, quite apart from any deterrent effect it would have on the Tribe's future willingness to provide full and candid submissions.

3. The harm caused by a public disclosure requirement in this context is not visited upon the Tribes and tribal members alone. This Court has repeatedly recognized the substantial public and governmental interest in the United States' fulfillment of its trust responsibilities regarding Indian property. See, *e.g.*, *United States* v. *Candelaria*, 271 U.S. 432, 443-444 (1926); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926); *Heckman* v. *United States*, 224 U.S. 413, 437 (1912). Indeed, because the United States holds legal title to the trust resources of Tribes and individual Indians, the documents at issue in this case bear directly on the appropriate management of *federal* property. The rule announced by the court of appeals in this case therefore would significantly impair the ability of the responsible officials of the United States government to vindicate important federal interests. Cf. *General Tel. Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 326 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").[14]

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[14] As we have explained (p. 7, *supra*), DOI's Departmental Manual states that agency policy is "to consult with tribes on a government-to-

### B. The Court Of Appeals Erred In Invoking The Tribes' "Direct Interest" In The Management Of Trust Property As A Basis For Declining To Apply Exemption 5

As we explain above (see pp. 21, 26-27, *supra*), the courts of appeals in construing Exemption 5 have applied a "functional test" that focuses on the role a document plays in the agency's performance of its assigned responsibilities, and on whether the document's public disclosure would result in harms comparable to those caused by release of agency-created records. The court of appeals in the instant case found those precedents to be inapposite because "the Tribes with whom the [DOI] has a consulting relationship have a direct interest in the subject matter of the consultations." Pet. App. 8a. We agree that in some contexts, a private party's financial or similar stake in the outcome of a govern-

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government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety." J.A. 55. That policy statement further clarifies that the tribal submissions in this case were not foisted on an unreceptive agency, but were solicited by the DOI in order to assist the agency in its performance of trust responsibilities.

Executive Branch policy statements issued in November 1993 and April 1994 state that consultations between federal and tribal officials "are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals." J.A. 50; see J.A. 53. DOI interprets those statements to mean that federal and tribal officials (the "interested parties" to the consultations) are to deal *with each other* in an "open and candid" manner—not that the substance of the consultations is to be communicated to the public, as the court of appeals seemed to believe (see Pet. App. 10a). The Departmental Manual clarifies that information received by DOI through consultation with tribal representatives "shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s)." J.A. 58; see p. 7, *supra*.



ment decision might create a sufficient divergence of interests between himself and the government that the agency could not reasonably enter into a confidential consultancy relationship with the party.[15] As applied to federal officials' performance of trust or similar representational duties, however, the court of appeals' reasoning is deeply flawed.

As we explain above (see pp. 29-30, *supra*), when federal officials are assigned to perform fiduciary or other representational functions that have historically entailed a duty of confidentiality, the parties to that relationship will have a mutual expectation that the government will carry out those functions in accordance with established standards. A duty to maintain the confidentiality of information acquired in administering a trust where disclosure would disserve the beneficiary's interests has traditionally been an integral feature of the trustee's responsibilities. The beneficiary's

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[15] In many situations (notice-and-comment rulemaking, see 5 U.S.C. 553, being the most obvious example), federal agencies solicit recommendations from interested parties as to the course of action the government should take. Such recommendations often assist the agencies involved to obtain a fuller understanding of the potential practical and legal consequences of their decisions. We do not contend, however, that those submissions can be treated as "intra-agency memorandums or letters" simply because they contribute to the agency's decisionmaking process.

This Court has long recognized, however, that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). In its role *as trustee* for tribal natural resources, the United States is subject to a duty of loyalty separate and distinct from (though not inconsistent with) the general obligation of the Executive Branch to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. To say that the government's role as trustee entails a duty of confidentiality does not suggest that communications from all persons seeking favorable treatment from the government are exempt from disclosure under the FOIA.

interest in the trust property, and the trustee's duty to protect that interest, form the essence of the trust relationship. To put it another way, the trustee's distinct responsibilities—including the duty of confidentiality—run precisely to those persons having an interest in the trust corpus. It is therefore perverse to treat the Klamath Tribes' "direct interest" in the protection and quantification of their water rights within the Klamath Basin as a ground for public disclosure of communications made by the Tribes to the BIA when acting in fulfillment of the United States' responsibilities as trustee for tribal property.[16]

In its capacity as trustee, the United States owes a duty of loyalty to Indian Tribes, resulting from the unique legal relationship—emanating from the Constitution and congressional mandates and recognized for nearly two centuries by this Court—in which the United States holds the lands and associated resources of Tribes (and individual Indians) in trust for their benefit. Because a Tribe's communications with the government concerning trust resources are integral to its "governmentally conferred capacity," *United States Department of Justice* v. *Julian*, 486 U.S. 1, 18 n.1 (1988)

[16] Although an agency's relationship with an outside consultant is typically formed on an ad hoc basis at the discretion of the agency, the BIA's relationship with Indian Tribes concerning trust property is enduring and arises by operation of law. Confidential treatment of tribal submissions relating to trust resources recognizes the Tribes' enduring interest in the integrity of that relationship, in addition to the governmental interest in receiving candid advice that generally underlies (see pp. 26-27, *supra*) the application of Exemption 5 to documents submitted by an outside consultant. For that reason it was especially inappropriate for the court of appeals to afford communications with Indian Tribes concerning their trust property a dignity less than that of communications with ordinary consultants, based on the court's view of a factor—the Tribes' interest in their trust resources—that is the very foundation for the relationship and the very reason why the BIA solicits the Tribes' advice and assistance.



(Scalia, J., dissenting) (see pp. 3-4, *supra*), as trust beneficiary, a basic congruence of interests is inherent in the trust relationship. Indeed, a Tribe's "direct interest" in the trust property makes it a particularly appropriate "consultant" with respect to the BIA's performance of its trust responsibilities. That is particularly so in light of the federal government's increasing commitment to principles of tribal self-determination, prompted by the growing recognition that the Tribe is most often the best judge of its own interests. See note 13, *supra*.[17]

[17] The plaintiff in *Public Citizen* (see pp. 30-31, *supra*) contended that the records in question were subject to disclosure because "the former President has a distinct and independent interest that makes him an adversary rather than a consultant." 111 F.3d at 171. The court acknowledged that "a former President's power to assert his rights and privileges * * * constitutes an independent interest." *Ibid.* The court held, however, that neither "[t]he existence of independent presidential interests" nor the possibility of future conflict between the former President and the Archivist was sufficient to negate the consultative relationship. *Ibid.* It observed in that regard that "[d]octors, lawyers and other expert advisors may find themselves in litigation as either plaintiffs or defendants against those whom they advise (e.g., breach of contract and malpractice claims), but for all that they are still consultants." *Ibid.*

Similarly here, the mere possibility that an Indian Tribe might be dissatisfied with the government's performance of its duties as trustee in a particular instance in the future should not obscure the basic congruence of interests that is inherent in the trust relationship. To the contrary, a Tribe—like the former President in *Public Citizen*—is an especially valuable and appropriate consultant in this setting because it "clearly qualifies as an expert on the implications of" the government's decisions regarding the management and protection of trust property. See 111 F.3d at 171. As the dissenting judge in the instant case explained, "[t]he mandated consideration that the Bureau and Department have to give to the Klamath Basin Tribes' claims virtually requires that they consult the Tribes, much as the Archivist consulted the ex-President, to seek their peculiar expertise concerning their rights." Pet. App. 25a.

### C. The Records At Issue Here Are Not Properly Characterized As "Ex Parte Communications"

The court of appeals also stated that to permit withholding of the documents at issue in this case "would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the [DOI]." Pet. App. 10a. That reasoning, too, is flawed.

1. The error in the court of appeals' analysis is particularly clear with respect to the documents pertaining to the Oregon general stream adjudication. In that proceeding, the federal government is not the decisionmaker; its role is limited to the presentation of claims (on its own behalf and on behalf of Tribes) for ultimate resolution by state officials. See *United States* v. *Oregon*, 44 F.3d 758, 762-764 (9th Cir. 1994) (describing procedures to be employed in the state adjudication), cert. denied, 516 U.S. 943 (1995). As the dissenting judge explained, the court of appeals' analysis "fails to recognize * * * that at least four of the seven documents were used by the Bureau and the Department to prepare to represent the Tribes' claims in the Oregon water rights adjudication—not a proceeding which either the Bureau, or the Interior Department, has the authority to 'resolve.'" Pet. App. 23a n.4. Submissions intended to assist federal officials in their performance of representational functions before a state adjudicative body cannot sensibly be characterized as "ex parte communications."

Consistent with its trust obligation, the United States has historically represented the interests of the Tribes in disputes over their property and natural resources, including water rights. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 113, 116, 127 (1983); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 812-813 (1976); *Arizona* v. *California*, 373 U.S. 546, 595-601 (1963); *United States* v. *Powers*, 305 U.S. 527, 528 (1939); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). Effective representation in that setting requires the exchange of communications between federal and tribal officials in furtherance of the common purpose of protecting the Tribes' resources. Common law doctrine protecting exchanges of information between parties with a common interest in litigation "has been recognized in cases spanning more than a century." *United States* v. *McPartlin*, 595 F.2d 1321, 1336 (7th Cir.), cert. denied, 444 U.S. 833 (1979); see also *United States* v. *Schwimmer*, 892 F.2d 237, 243-244 (2d Cir. 1989); *United States* v. *American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). That privilege is specifically recognized in the Oregon Evidence Code and therefore will presumably be available in the state water-rights adjudication. See Or. Rev. Stat. § 40.225 (1997), Or. Evid. Code R.503(2)(c) (recognizing privilege for communications "[b]y the client or the client's lawyer to a lawyer representing another in a matter of common interest").

The court of appeals' decision places the Klamath Tribes at a distinct disadvantage vis-à-vis other claimants in the Oregon adjudication. Under the court's ruling, the Tribes' communications to their representative (the United States) will be subject to compelled disclosure under the FOIA, without regard to the applicability of any traditional discovery privilege. Opposing claimants in the state proceeding, by contrast, may continue to assert all available privileges with regard to documents passing between themselves and their own representatives. Such a regime would facilitate the use of the FOIA "to supplement civil discovery"—a result that this Court has "consistently rejected." *Weber Aircraft Corp.*, 465 U.S. at 801; see p. 28, *supra*.[18]

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[18] The attorney-work-product privilege in particular has historically served to protect counsel against intrusive inquiries from their opponents

Although the rule adopted by the court of appeals would substantially disrupt the federal-tribal trust relationship in a variety of settings, its impact on litigation concerning tribal resources would be especially deleterious. The United States is currently representing tribal interests in litigation in 122 cases. In the course of litigation and negotiations concerning trust resources, the BIA and the Justice Depart-

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in litigation. As the Court explained in *Hickman* v. *Taylor*, 329 U.S. 495 (1947):

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

*Id.* at 510-511; see also *id.* at 516 (Jackson, J., concurring) ("I can think of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him."). As the discussion quoted above makes clear, moreover, the attorney-work-product privilege as it applies to federal lawyers is by its nature often likely to involve information obtained from outside the government.

**PUBLISHER'S NOTE:**

**Page 45 is missing in original document.**

to the Tribe" by representing competing interests in the earlier adjudication. *Id.* at 141. This Court disagreed, explaining that

> where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.

*Id.* at 142. The Court held that "the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the [prior] suit," notwithstanding the fact that both interests were represented by the United States in the earlier proceeding. *Id.* at 143. The Court thus recognized that the United States government's duty to consider and advance a variety of interests necessarily coexists with its obligation as trustee to represent Indian Tribes and protect tribal property rights.

In the instant case, the documents pertaining to the KPOP were submitted to (or created by) the BIA in carrying out the United States' obligations as trustee for the tribal water rights potentially affected by the operation of the Klamath Project. The Court in *Nevada* v. *United States* observed that the government's trust obligations in its dealings with Indian Tribes "have been traditionally focused on the Bureau of Indian Affairs." 463 U.S. at 127; see also *id.* at 135-138 n.15; *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968) (identifying the BIA as "the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States"); cf. *Morton* v. *Mancari*, 417 U.S. 535, 554 (1974) (explaining that the "lives and activities" of tribal members "are governed by the BIA in a



unique fashion," and that "the legal status of the BIA is truly *sui generis*").

The fact that DOI must also take into account the interests of other water users in exercising ultimate decisionmaking authority with respect to the KPOP does not alter the duty of loyalty to the Tribes owed by the agency acting in its fiduciary role. The KPOP-related documents submitted by the Tribes were furnished to the BIA rather than to the BOR. That fact reinforces the conclusion that the documents, while assuredly relevant to DOI's performance of its ultimate decisionmaking responsibilities with respect to the KPOP, were provided to the Department *in its capacity as trustee.* The court of appeals failed to recognize that the limitation upon FOIA's overall goal of open government that the confidential trust relationship requires is simply an unavoidable consequence of the DOI's dual role as trustee for Indian Tribes and as federal policymaker. See *Nevada* v. *United States*, 463 U.S. at 127-128 (noting the DOI's often-conflicting responsibilities to act as trustee for Indian resources and to manage federal water reclamation projects); *Idaho* v. *Oregon*, 444 U.S. 380, 391 (1980) (referring to the United States' "role as trustee for the Indians" and "its role as manager of the ocean fishery and the dams"). Because the documents at issue here were submitted to (or created by) the government in its capacity as trustee, the court of appeals erred in analogizing those documents to "ex parte communications." They are, rather, communications made in an ongoing relationship of trust and confidence that serves to fulfill the commitments of the United States to the Indian Tribes—commitments that derive both from the Constitition, treaties, and laws of the United States, and from a course of dealing over the Nation's history that has, in turn, given rise to a duty of protection.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND UNITED STATES BUREAU OF INDIAN AFFAIRS,

*Petitioners,*

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## QUESTION PRESENTED

Whether correspondence between Indian Tribes and the Department of Interior related to ongoing proceedings involving water rights and water allocations in which both the Tribes and Respondent have substantial interests, should be treated as intra-agency memorandums eligible for protections against Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), based on the Government's assertion that confidentiality is necessary to effectively perform its role as trustee for the Tribes.

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## STATEMENT

This case involves Exemption 5 of FOIA, which shields from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The United States Department of Interior ("Interior") and United States Bureau of Indian Affairs ("BIA") (collectively referred to herein as the "United States" or the "Government") continue to withhold seven disputed documents identified as correspondence between (i) BIA and/or Interior personnel, and (ii) certain Indian tribes (or their representatives) in the Klamath River Basin. These documents have been withheld on the alleged grounds that the Tribes are essentially "consultants" of Interior due to the trust relationship between the United States and Tribes, and that the correspondence between the United States and the Tribes, therefore, meet the so-called functional test of inter/intra-agency communications. As a result, the United States continues to assert that the documents are exempt from disclosure pursuant to the deliberative process privilege and/or attorney work-product privilege under FOIA Exemption 5.

*Factual Background.* Respondent Klamath Water Users Protective Association (the "Association") is a non-profit corporation formed under section 501(c)(5) of the Internal Revenue Code. 26 U.S.C. § 501(c)(5). J.A. 66. Most of the members of the Association have contracts with the U.S. Bureau of Reclamation ("Reclamation") providing for the delivery of water through Klamath Reclamation Project facilities for irrigation use. J.A. 66-67. Of these, most are public agencies, primarily irrigation districts, that use

water from the Upper Klamath Lake and Klamath River. J.A. 67. The Association provides information and representation for its members on matters in which they have a common interest, including water resources, agriculture, and other resources issues in or affecting the Klamath River Basin in northern California and southern Oregon.[1] J.A. 73.

The Klamath Reclamation Project was authorized in 1905 as one of the earliest reclamation projects under the Reclamation Act of 1902. 32 Stat. 388, codified as amended at 43 U.S.C. § 372 *et seq*. *See also* Act of February 9, 1905, 33 Stat. 714 (Act authorizing specified actions in connection with Klamath Project). The federal government financed the construction of canals and other facilities to deliver water to arid lands in the Klamath Project area. Landowners and irrigation districts, including many Association members, executed contracts with the Bureau of Reclamation providing for delivery of water through these facilities, and for the water users' repayment of construction costs. J.A. 66-67. Water rights have been perfected under state law for Klamath Project irrigation purposes. *See* Excerpts of Record ("E.R.") 419-420. These

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[1] The Klamath River Basin encompasses approximately ten million acres in south-central Oregon and northern California. The areas that are particularly important for this litigation include Upper Klamath Lake, the Klamath River, and the Klamath Reclamation Project. Upper Klamath Lake in Oregon is formed by the inflow of streams from the upper watershed. A dam at the outlet of Upper Klamath Lake impounds water at high run-off periods for storage and later use. Water can also bypass or be released from the dam, flowing down the Klamath River, over 200 miles to the ocean in California. J.A. 67.



water rights are the property of the water users (*see* Or. Rev. Stat 540.510 (water rights appurtenant to land); *Nevada v. United States*, 463 U.S. 110, 124-125 (1983); E.R. 419), and are recognized in Article III.A. of the Klamath River Basin Compact. Chap. 142, Oregon State Laws 1956 (Or. Rev. Stat. § 542.620); Cal. Stat. ch. 113 (1957) (Water Code, § 5901); Pub. L. No. 85-222, 71 Stat. 497. The Klamath Project currently serves approximately 230,000 acres of irrigated land, supporting thousands of families and their rural communities. J.A. 67.

Klamath Project irrigation water users and four tribes (the Klamath, Yurok, Hoopa Valley and Karuk Tribes, collectively referred to throughout this litigation as the "Klamath Basin Tribes" or "Tribes") intensely compete for water in a number of inter-related forums. In all of these forums, each Tribe seeks to reallocate Klamath Project water from current irrigation uses to its preferred uses. The major source of water stored for irrigation use in the Klamath Project is Upper Klamath Lake. J.A. 67. The Klamath Tribe, with fisheries located in or near Upper Klamath Lake, demands that more water be held in the lake. The Yurok, Hoopa Valley and Karuk Tribes demand increased releases from the lake to the Klamath River, to benefit their downstream fisheries. J.A. 117-118; Pet. App. 2a. Either of such actions results in the unavailability of water for Klamath Project irrigation. J.A. 67-68. Each Tribe advocates its interests strenuously with Interior, making scientific, legal and political arguments to support its own positions, and to obtain favorable actions from Interior. J.A. 68-69; E.R. 292-303, 309-311, 357, 361. Many actions advocated by the Tribes in these forums

would be detrimental to members of the Association. J.A. 67-68; Pet. App. 2a.

The Association brought this action under FOIA to obtain certain documents withheld by the United States that are related to these contentious disputes regarding water resources in the Klamath River Basin. All of these disputes revolve around the common issue of how much of the water in the Klamath Basin will be devoted to Klamath Project irrigation versus how much water will be allocated instead to supporting fisheries of importance to the Tribes. The goal of the Tribes is to allocate more water for instream use for the enhancement of these fisheries. *Id.*

One forum involving competition for water, and the principal forum giving rise to this case, is Interior's development of short-term and long-term Klamath Project Operations Plans (KPOPs), which began in approximately 1995.[2] E.R. 472-475. As noted, irrigation water rights in the Klamath Project are recognized by an interstate Compact ratified by Congress (see p. 2, *supra*), and contracts between Reclamation and its project irrigators that provide for use of this water on irrigated lands. Pet. App. 2a. The KPOPs, however, have been developed by Interior to prescribe the allocation of Klamath Project water supplies among tribal interests and irrigation interests. The KPOPs also are based on providing water for fish species listed as threatened or endangered under the Endangered Species Act. 16 U.S.C. § 1531 *et seq.* Such species are also claimed as trust assets by the Tribes. E.R.

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[2] Four of the withheld documents were transmitted in connection with the KPOP process. J.A. 40-48; *see also* note 7, *infra*.



581. Several Interior agencies, including the BIA, participate in KPOP preparation (E.R. 163, 169, 174 (describing KPOPs as a "multi-agency collaboration")), and KPOPs recently have been issued by Interior as a whole. *See, e.g.*, U.S. Department of Interior, Klamath Project 1998 Annual Operations Plan, Environmental Assessment.

The development of the KPOPs has been an extremely contentious process, involving irrigators, the Tribes, several environmental interests, and Interior agencies. J.A. 68-72, 115-118; E.R. 343, 423-426, 437.[3] During the early development of the KPOPs, the disputes included frequent demands by the Tribes that irrigation deliveries be severely curtailed or stopped entirely, and threats by the Tribes of lawsuits against Interior regarding how the Project was being operated. J.A. 71-72, 85, 89-101, 115-135. In 1995, Interior announced that it intended to prepare a long-term operations plan (i.e., a KPOP which would cover more than one irrigation season). J.A. 68; E.R. 288. In 1996, while in the process of preparing the long-term KPOP, Interior retained an independent consultant firm to analyze technical issues concerning water needs of fish and agriculture and other subjects. J.A. 69.[4]

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[3] The Association strenuously disputes Interior's authority to allocate water based on its own subjective determinations of water rights outside an adjudicatory process. E.R. 440. The Association's position is supported by the Attorney General of Oregon. E.R. 421-427. Nonetheless, the KPOPs proceed.

[4] *See also* 1995 Memorandum of Agreement For the Government-to-Government Relationship in the Development of the Klamath Project Operations Plan, between the Klamath Basin Tribes and various Interior agencies, acknowledging that

The long-term KPOP development process was open to all participants, with assurances given that it would remain an open, public process. J.A. 69-71; E.R. 474-475. Interior assured the parties that neither irrigators, Tribes, nor other parties outside of the federal government would have an opportunity to review the long-term KPOP before a draft plan was released publicly. J.A. 71. Irrigation representatives, as well as tribal representatives and attorneys hired by the Tribes, participated in the KPOP process and provided information and argument in support of their position. J.A. 71-82; E.R. 285-416. This participation involved each party advocating its legal and technical positions over whether and how much water should be allocated to the unadjudicated tribal water rights and species listed under the ESA, and whether Interior can require farmers to forego use of water. J.A. 115-116; E.R. 394, 439. Ultimately, a draft long-term KPOP was prepared for internal review of Interior agencies. J.A. 71. Tribes advocated, however, against a long-term KPOP, fearful it would be detrimental to their positions. E.R. 381. No draft long-term KPOP was released for public review and comment. Instead, since that time, the KPOPs have been released on an annual basis for each irrigation season. J.A. 71-72.

Another forum where Klamath Project water users and Tribes assert conflicting interests is the general stream adjudication of the Klamath River Basin being

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an independent consultant had been hired to conduct the bulk of the technical work related to the KPOP, and that the Tribes will provide comments to the consultant. J.A. 61-62.



conducted by the State of Oregon (hereinafter, the "adjudication").[5] In this adjudicatory process, the State of Oregon will determine and quantify currently unadjudicated water rights, including rights initiated before 1909 (such as Klamath Project irrigation water rights) and federal "reserved" rights (such as tribal claims, national forests, wildlife refuges). See *United States v. Oregon*, 44 F.3d 758, 762 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995). The Yurok, Hoopa Valley and Karuk Tribes are not parties to the adjudication. However, the Klamath Tribe, whose former reservation was upstream of Upper Klamath Lake, claims the benefit of a federal reserved water right in Upper Klamath Lake to maintain lake elevations for the ostensible benefit of fisheries and other resources in the lake. The United States Department of Justice, on behalf of the United States as trustee, has filed a claim in the adjudication for determination of this federal reserved water right, and independently, the Klamath Tribe has, through its own attorneys, filed a parallel claim for the same water right in Upper Klamath Lake. J.A. 80.[6] Irrigation water users have filed claims for determination of rights for irrigation in the Klamath Project, and the

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[5] In the Matter of the Determination of the Relative Rights to the Use of Waters of the Klamath River and Its Tributaries, currently before the Water Resources Director of Oregon. Three of the documents withheld in this case were submitted in connection with the adjudication. J.A. 44-77; *see also* note 7, *infra*.

[6] Most claims filed by the Klamath Tribe in the adjudication, including the claim in Upper Klamath Lake, are identical to the claims filed by the United States, but they still stand as distinct and separate claims. In at least one instance, there is a difference in the quantity of water claimed by the Tribe and the United States in the claims on file..

United States has filed parallel water right claims to assert and protect irrigation water rights in the Klamath Project. J.A. 80; E.R. 596-597. While the United States and the irrigation water users in the Klamath Project dispute the ownership of the irrigation water rights, they have cooperated in the preparation of their parallel claims of water rights for irrigation. In the adjudication proceeding, parties will dispute whether and in what amounts water must be held in Upper Klamath Lake for fish species, to the detriment of irrigation water users.

*Proceedings in this Case.* This case arose after the Association submitted several FOIA requests to Interior agencies, including the BIA, for documents provided to, or received from, the Klamath Basin Tribes pertaining to water resources issues in the Klamath River Basin. These requests were made primarily to discern what information was being exchanged with interested parties during Interior's preparation of the draft long-term KPOP. *See* Pet. App. 3a. Specifically, Association members were concerned that the draft long-term plan had been shared with the Tribes (despite Interior's representations that this would not occur), and that objections of the Tribes had led to the "vetoing" of the plan. J.A. 71. In addition, the Association's FOIA requests were made only after Interior had freely provided to the Tribes, pursuant to the Tribes' own earlier FOIA requests, copies of communications between the Association members and the United States regarding the KPOP and the adjudication. J.A. 81, 102-110; Pet. App. 37a.

In its initial responses to the Association's FOIA requests, the BIA released some documents, but refused



to disclose approximately forty (40) responsive documents on the grounds that they were exempt from disclosure pursuant to the FOIA Exemption 5. E.R. 23-30, 64-73. Subsequently, the BIA released on a piecemeal basis a number of documents that had been initially withheld, and the Association withdrew its requests as to certain other withheld documents that were either provided to the Association by another Interior agency (*i.e.*, Reclamation), or were eventually described in enough detail in the United States' *Vaughn* index and declarations to satisfy the Association that the documents were likely exempt. *See Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); J.A. 78; E.R. 37-38, 123-132, 381-404, 486-499. The seven documents remaining in dispute, consisting of a total of 31 pages, are described in the United States' *Vaughn* index and declarations as: (i) three items of correspondence provided by the Tribes to Interior in connection with the KPOP; (ii) a memorandum from Interior to the Tribes in connection with the KPOP; and (iii) three items of correspondence from the Klamath Tribe to Interior in connection with the adjudication.[7] The United States asserts that the

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[7] One of the withheld documents, identified as Document 3, FOIA Appeal 96-168, has at times been characterized as addressing both the KPOP and the adjudication. *See* Govt. Br. 11; J.A. 40-41; Pet. App. 17a, 23a. In its own declaration, however, the Government admits that "the document discusses the issues therein specifically in terms of the Operations Plan development." E.R. 470. The Government's declarant attempts to explain away the specific content of the document by asserting that he and the author had discussed how the issues in the document apply equally to both the KPOP and the adjudication, and "[s]ince that time, I have always considered

deliberative process privilege protects all seven documents from disclosure, and that the attorney work-product privilege applies as an additional basis for withholding two of the seven documents. *See* J.A. 40-48; Pet. App. 6a-7a; *see also* Index to Documents Remaining in Dispute, Appendix, *infra*, 1a.[8]

This case was originally referred to a magistrate judge, who recommended that the Government's motion for summary judgment be granted on the basis that the withheld documents were protected from disclosure under Exemption 5. The magistrate judge found that all of the documents qualified as inter/intra-agency communications, and that they were shielded from disclosure by the deliberative process privilege and/or the attorney work-product privilege. Pet. App. 56a-61a. The district court adopted the magistrate's findings and recommendations, and entered judgment for the Government. Pet. App. 31a-32a.

The court of appeals reversed. Pet. App. 1a-30a. The court declined to apply in this case the "functional test" expansion of FOIA Exemption 5 that has been adopted by other courts of appeals, and held that "the documents fail[ed] to meet the threshold inter-agency/intra-agency

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the issues analyzed in that document as inextricably linked with both the Operations Plan development and the Oregon adjudication process." *Id.* This "perception" of the document obviously does not alter its specific content. Thus, only three documents truly address the adjudication.

[8] A previous version of this index was attached as an exhibit to the Association's reply brief on the merits in the Ninth Circuit, and in the Appendix to Respondent's Brief in Opposition herein, without objection by the United States.



test" under Exemption 5. Pet. App. 10a. The court found that this case is distinguishable from those where the "functional test" has been applied, emphasizing that the Tribes have asserted conflicting claims against the Association, and that the Tribes have a direct interest in the subject matter of the submissions – e.g., Interior's decisions with respect to the KPOP, and Interior's decisions regarding the scope and extent of the various claims to be filed by the United States in the adjudication. Pet. App. 6a-8a. The court of appeals found that "consultation with the tribes is not similar to 'the advice from staff assistants and exchange of ideas among agency personnel' that forms the object of exemption five. . . . " Pet. App. 9a. Having concluded that the withheld documents did not meet the threshold inter/intra-agency test, the court of appeals determined that it "need not reach the other issues raised by the Association," which include whether the withheld documents were deliberative, and whether the district court properly exercised its discretion in conducting an *in camera* review of the documents. Pet. App. 10a.

## SUMMARY OF THE ARGUMENT

The Government in this case essentially asks the Court to rewrite the language of FOIA Exemption 5 to recognize a wholly new exemption to FOIA based upon the Government's trust responsibilities to Indian Tribes. To do so would obviously contravene this Court's decisions and Congressional mandates that the exemptions to FOIA must be construed narrowly. The documents at issue in this case comprise communications between the

Government and Indian Tribes that have a direct interest in the outcome of the Government's decisions and actions involving competing claims to valuable water rights. The Government alludes variously to a number of grounds of privilege, and an alleged necessity for confidentiality under its trust relationship with the Tribes, to assert that the documents are intra-agency in nature and protected from disclosure under Exemption 5. However, nothing in FOIA – a statute whose dominant objective is disclosure not secrecy, and whose exemptions have been consistently given a narrow compass – even suggests, much less requires, that a judicial gloss be placed on the construction of Exemption 5 to extend its protections to parties directly interested in the outcome of an agency's decisions or actions.

As the court of appeals correctly held, the argument that the communications at issue here are "intra-agency" in nature fails. The Tribes are not neutral participants in the Government's deliberative decisionmaking process, but are interested advocates pressing for a particular outcome affecting not only their water rights claims, but also the water rights claims of Respondent's members and the United States. Directly interested parties are not the kind of neutral hired experts that could be considered the functional equivalent of agency staff, and relied upon by agency decisionmakers to provide frank and objective advice. Rather, interested parties are advocates of their own particular interests, and, when communicating with an agency decisionmaker, they understandably seek to influence the agency's decisionmaking process in a way most favorable to them.



Stripped to its essence, the Government's claim in this case is that its trust relationship with the Tribes is sufficient to qualify the withheld documents as intra-agency communications. The Government's request to expand Exemption 5 on this basis ignores the fact that the trustee-beneficiary relationship confers no privilege against disclosure. This claim also ignores the fact that in making its decisions in the underlying proceedings, the Government must necessarily consider and represent the interests of both the Tribes and the Respondent's members. Moreover, the Government's attempt to expand the reach of Exemption 5 to protect communications occurring within the purview of this trust relationship would, for all practical purposes, implicate nearly all communications between Indian Tribes and the United States. This expansion is particularly unnecessary given that under other circumstances, grounds may exist under other FOIA exemptions to withhold information shared by Indian Tribes with the United States. As we explain below, this Court should not countenance the Government's claim that its trust relationship with the Tribes satisfies the intra-agency test, or otherwise provides a privilege against disclosure, under FOIA Exemption 5.

## ARGUMENT

Under the plain language of the statute, FOIA makes available to any person all federal agency records, 5 U.S.C. § 552(a), with the exception of just nine specifically enumerated categories of records. 5 U.S.C. § 552(b). FOIA's provisions are clear and unambiguous that the nine exemptions are exclusive, and that documents must

be made available "except as specifically stated." 5 U.S.C. § 552(d). This Court has observed that Congress's intent in enacting FOIA was to "open agency action to the light of public scrutiny" (*Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 772 (1989) (citation omitted)), and in so doing to "clos[e] the 'loopholes which allow agencies to deny legitimate information to the public.' " *Department of Justice v. Tax Analysts*, 492 U.S. 136, 148, 150 (1989) (quoting *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 385 (1980)). The legislative history, moreover, evinces Congress' concern that section 3 of the APA, the precursor to FOIA, was full of "loopholes" to disclosure, which agencies used to "cover up embarrassing mistakes or irregularities." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); *see also Freedom of Information Act Sourcebook, Legislative Materials, Cases, Articles*, S. Doc. No. 93-82, 93d Cong., 2d Sess. 7 (1974).[9]

Accordingly, a chief aim of FOIA's enactment was to "set[ ] up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases 'good cause found,' 'in the public interest,' and 'internal management' with specific definitions of information which may be withheld." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2 (1966). In enacting FOIA, Congress stated that "[i]t is the general purpose of

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[9] Congress noted that the APA's vague standards for exempting disclosure had "been subject to conflicting interpretations, often colored by personal prejudices and predilections," thereby defeating "the very purpose for which it was intended – the public's right to know the operations of Government." S. Rep. No. 813, *supra* at 8.



the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. . . . " *Id.* at 3. Congress thus required agencies to adhere to "a general philosophy of full agency disclosure." *Tax Analysts*, 492 U.S. at 142 (citation omitted) (quoting S. Rep. No. 813, *supra* at 3). "Congress believed that this philosophy, put into practice, would help 'ensure an informed citizenry, vital to the functioning of a democratic society.' " *Tax Analysts*, 492 U.S. at 142, quoting *National Labor Relations Board v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

In addressing the nine specific exemptions from disclosure under the Act, this Court has stated that "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Thus, "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Tax Analysts*, 492 U.S. at 151. Justice O'Connor has explained that Congress sought "to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the 'availability of records to the public' is not limited, 'except as *specifically* stated.' " *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 642 (1982) (dissenting opinion) (emphasis in original), quoting 5 U.S.C. § 552(c) (now codified at 5 U.S.C. § 552(d)). Accordingly, this Court has emphasized that FOIA's exemptions must be "narrowly construed." *Federal Bureau of Investigation*, 456 U.S. at 616; *Reporters Committee for Freedom of Press*, 489 U.S. at 772-773; *Department of Justice v. Julian*, 486 U.S. 1, 8 (1988); *Department of Air Force*, 425 U.S. at 361.

The Government in this case essentially asks the Court to recognize a wholly new FOIA exemption by rewriting the language of Exemption 5.[10]

To do so would obviously run counter to this Court's decisions construing the statute.

## THE WITHHELD DOCUMENTS ARE NOT PROTECTED UNDER EXEMPTION 5, WHICH PROTECTS ONLY INTER/INTRA-AGENCY DOCUMENTS THAT ARE NORMALLY PRIVILEGED IN THE CIVIL DISCOVERY CONTEXT

Exemption 5 permits federal agencies to withhold "inter-agency or intra-agency memorandums or letters

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[10] The Government makes no claim – and this Court obviously has not granted certiorari – on any issues concerning the interpretation of any other FOIA exemptions. In evaluating the Government's policy-oriented arguments for reading Exemption 5 in a manner belied by its language and prior interpretation, though, it is noteworthy that grounds may sometimes exist under other exemptions for withholding from FOIA disclosure certain information shared by Indian Tribes with the United States. As even some of the *amici* acknowledge (Klamath Tribes Br. at 14; United South and Eastern Br. at 19), FOIA Exemption 4 protects "commercial or financial information obtained from a person [that is] privileged *or confidential*." (emphasis added). There is no requirement that such information be "intra-agency" in character, and Exemption 4 is not limited to material which would be privileged against disclosure in litigation. The availability of this exemption to protect trade secrets and genuinely sensitive commercial information makes all the more unreasonable the Government's plea for a rewriting of Exemption 5 to assure the protection of confidences shared with it by the Tribes pursuant to their trustee-beneficiary relationship.



which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This Court repeatedly has interpreted this exemption as "incorporat[ing] the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *see also Julian*, 486 U.S. at 11; *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *Federal Trade Commission v. Grolier*, 462 U.S. 19, 26 (1983). Indeed, the Court has stated that Exemption 5 protects "*those documents, and only those documents*, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (emphasis added); *Renegotiation Board*, 421 U.S. at 18; *Weber*, 465 U.S. at 799; *Julian*, 486 U.S. at 11; *see also* S. Rep. No. 813 *supra* at 9 (the purpose of Exemption 5 is to exempt only those documents "which would not be available by law to a private party in litigation with the agency."). Thus, "[t]he test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance" in civil litigation with the agency. *Grolier*, 462 U.S. at 26; *Julian*, 486 U.S. at 12.

Accordingly, for Exemption 5 to apply, the Government must establish that the withheld documents "(a) are 'inter-agency or intra-agency memorandums or letters,' and (b) consist of material that 'would not be available by law to a party . . . in litigation with the agency.' " *Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 352 (1979). Here, because the documents withheld by the United States are not "inter/intra-agency" correspondence, and

because there is no recognized privilege or other protection that would shield the documents from disclosure in civil litigation against Interior, Exemption 5 does not apply. The court of appeals, therefore, correctly held that the documents must be disclosed.

### A. The Documents in Issue Are Not "Intra-Agency Memorandums" Because the Tribes Have a Direct Interest in the Government's Decisions And Actions At Issue

The Klamath Basin Tribes, by the Government's admission, are "outside the government." Brief For The Petitioners ("Govt. Br.") 2. Indeed, the Tribes are sovereign nations whose interests in maintaining high Upper Klamath Lake levels and/or increasing releases to the Klamath River are at stake in the Interior KPOP proceedings, and are directly adverse to those of the irrigators that the Association represents. Pet. App. 2a. Six of the seven withheld documents are correspondence from the Tribes (or their representatives) to Interior personnel. The remaining document is a BIA memorandum addressed to, among others, attorneys hired by the Tribes. J.A. 40-48. Thus, none of the documents at issue in this case are literally "inter-agency or intra-agency" documents under FOIA Exemption 5. Nor, consistent with fundamental notions of fairness and due process, could they be.

Common sense rebels at the thought that directly interested parties could be permitted to conduct secret, ex parte communications with an agency decisionmaker balancing competing claims to valuable water rights. Directly interested parties are not the kind of neutral



hired experts that some courts of appeals have described as the "functional equivalent of agency staff" relied upon by agency decisionmakers to provide frank and objective advice. *See, e.g., United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1218 (D.C. Cir. 1980). Rather, interested parties are advocates of their own particular interests, and, when communicating with an agency decisionmaker, they understandably seek to influence the agency's decisionmaking process in a way most favorable to them. Such communications should be disclosed in order to ensure that the public can evaluate the impact that interest groups may have on agency policies and decisions. The public's interest in preventing self-dealing, collusion or overreaching on the part of the special interest is preeminent, and should outweigh any claim to secrecy. *See* Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 Col.L.Rev. 895, 942 (1974).

Accordingly, administrative law has long reflected antipathy toward interested parties' attempts to skew agency decisionmaking by way of ex parte communications. In fact, FOIA's direct predecessor – Section 3 of the APA as enacted in 1946 – was aimed squarely at preventing interested parties from secretly skewing governmental decisionmaking: "Administrative operations and procedures are public property, which the general public, *rather than a few specialists and lobbyists*, are entitled to know." H.R. Rep. No. 752, 79th Cong., 1st Sess. 198 (1945) (emphasis added). Moreover, the current version of the APA specifically prohibits ex parte contacts with agency decisionmakers in the context of formal rulemaking and formal adjudication. *See* 5 U.S.C. §§ 551(14), 557(d)(1).

This Court has held that ex parte communications are also improper even in less formal agency actions. In *Morgan v. United States*, 304 U.S. 1 (1938), this Court reviewed a "quasi-judicial" action of the Secretary of Agriculture fixing maximum allowable rates for livestock sales commissions. *Id.* at 19. The Bureau of Animal Industry opposed the livestock brokers at the rate hearings, prepared findings, and submitted the findings to the Secretary for final decision without affording the brokers an opportunity for examination. *Id.* at 17. The Court held that whatever the "form of the proceeding," it "had all of the essential elements of contested litigation" and that the "right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Id.*

*Morgan*'s holding is reflected in numerous lower federal court decisions, which also emphasize *Morgan*'s constitutional footing: "Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among conflicting private claims to a valuable privilege, the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved." *Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981); *accord, e.g., National Small Shipments Traffic Conference, Inc. v. ICC*, 590 F.2d 345, 350 (D.C. Cir. 1978); *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 539-40 (D.C. Cir. 1978); *Action for Children's Television v. FCC*, 564 F.2d 458, 475 (D.C. Cir. 1977); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55-56 (D.C. Cir. 1977); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959). Indeed,



in the past, the government has been a key proponent of this position (*see Sangamon Valley*, 269 U.S. at 224), and federal agencies generally have embraced it as well (*see Ex Parte Communications in Informal Rulemaking Proceedings*, 42 Fed. Reg. 54,253 (Oct. 5, 1977); J. Lubbers, *A Guide to Federal Agency Rulemaking* 230-33 (3d ed. 1998)).

These cases stress that "secrecy" of communications is "inconsisten[t] . . . with fundamental notions of fairness implicit in due process." *Home Box Office*, 567 F.2d at 56. Disclosure of interested party communications helps "to afford adequate safeguards to private interests" by avoiding the "potential for unfair advantage" to a subset of interested parties. *Action for Children's Television*, 564 F.2d at 472, 475, 477; *see also United States Lines*, 584 F.2d at 534 (preserving "adversarial comment among the parties" ensures that they "are afforded the opportunities guaranteed them . . . meaningfully to participate"). These protections are particularly crucial where the proceedings "involve[ ] competitive interests of great monetary value and confer[ ] preferential advantages." *Home Box Office*, 567 F.2d at 62 (Mackinnon, J., concurring specially); *see, e.g., Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915) (agency action triggers due process concerns where "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds"). And, as in *Morgan*, these cases emphasize that it is the substance of the agency proceeding, and not the label attached, that triggers the due-process-mandated prohibition on ex parte communications. *See, e.g., Action for Children's Television*, 564 F.2d at 475 & n.29; *Sangamon Valley*, 269 F.2d at 224.

Interior's KPOP process is itself an administrative proceeding that triggers due process concerns. In creating the KPOP, Interior attempts to resolve "conflicting claims to a valuable privilege" (*Sierra Club*, 657 F.2d at 400) – *i.e.*, water from the Klamath River Basin. Pet. App. 3a. Both the Tribes' and the irrigators' communications to Interior seek to influence the agency's decisionmaking process in order to protect their extremely valuable, and conflicting, water rights. Decisions made by Interior based upon tribal advocacy will affect Association members' water rights and, indeed, their very livelihoods. Moreover, at the outset of the KPOP proceeding, Interior assured interested parties it would conduct the proceeding as "an open, public process in which no interest would receive special or preferred treatment." Pet. App. 36a; J.A. 69. Accordingly, "basic notions of due process" (*Sierra Club*, 657 F.2d at 400) require that the KPOP proceedings remain open to all interested parties.

Although the Government distinguishes the adjudication from the KPOP, because the State of Oregon will be the ultimate "decisionmaker" in the former (Govt. Br. 42), the concerns regarding secret communications in the context of the Government's proceedings in the adjudication are no less important. As noted above (see pp. 7-8 *supra*), the project water users and the Klamath Tribe have each filed distinct claims in the adjudication. The United States has filed parallel federal reserved water rights claims to benefit the Tribe, and project irrigation water rights claims to benefit the water users. In determining how to proceed with its parallel claims, the United States will necessarily be making decisions as to how best to advocate the inherently competing interests of the Tribe and



the project water users, a decisionmaking process that the Government admits is "closely related" (Govt. Br. 45 n.19) to the KPOP proceedings. *See Nevada*, 463 U.S. at 128; *see also* pp. 39-40, *infra*. Thus, the same basic fairness concerns that must prohibit ex parte communications in the KPOP proceedings should likewise prohibit secret advocacy by the Tribe designed to influence the Government's adjudication positions.

Nothing in FOIA – a statute whose "dominant objective" is "disclosure, not secrecy" (*Department of Air Force*, 425 U.S. at 361) and whose exemptions "have been consistently given a narrow compass" (*Tax Analysts*, 492 U.S. at 151) – even suggests, much less requires, that a judicial gloss be placed on the definition of "intra-agency" to extend Exemption 5 to parties directly interested in the outcome of an agency's decision. FOIA "does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum." *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970); *accord Stokes v. Brennan*, 476 F.2d 699, 703 (5th Cir. 1973). Indeed, the lack of basic fairness here is exacerbated by the Government's policy of freely providing the Tribes with copies of communications between the Association members and Interior regarding the Association's advocacy on these very same issues. J.A. 81, 102-110; Pet. App. 37a; *see, e.g., State of North Dakota v. Andrus*, 581 F.2d 177, 181 (8th Cir. 1978) ("The selective disclosure exhibited by the Government in this action is offensive to the purposes underlying the FOIA and intolerable as a matter of policy.").

In summary, as the court of appeals held (Pet. App. 9a-10a), the argument that the tribal communications at

issue here are "intra-agency" in nature fails. The Tribes are not neutral participants in a deliberative decision-making process, but are interested advocates pressing for a particular outcome. The Committee Reports accompanying FOIA explained the purpose of Exemption 5 was to encourage frank communications from agency staff. ("Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended . . . that advice from *staff assistants* and the exchange of ideas among *agency personnel* would not be completely frank if they were forced to 'operate in a fishbowl.' ") H.R. Rep. No. 1497, *supra* at 10 (emphasis added); *see also* S. Rep. No. 813, *supra* at 3. This emphasis on frank and candid agency discussions indicates that a broad underlying purpose behind Exemption 5 was to incorporate the deliberative process privilege. *See also EPA v. Mink*, 410 U.S. 73, 86 (1973) ("Congress intended [in Exemption 5] to incorporate the generally recognized rule that 'confidential intra-agency opinions . . . are privileged from inspection.' ") As discussed below, the documents are not subject to withholding based upon the deliberative process privilege, which provides a further basis as to why the documents do not qualify as intra-agency communications.

### B. The Documents in Issue Would Not Be Privileged Against Discovery in Civil Litigation with the United States

Exemption 5 can apply only if the documents would also be protected against disclosure in litigation by an existing privilege. Throughout its brief, the Government alludes variously to a number of grounds of privilege,



and an alleged necessity for confidentiality under the United States' trust relationship with the Tribes, to assert that the documents are intra-agency in nature and exempt from disclosure. As discussed below, however, there are no recognized grounds of privilege that would bar discovery of the disputed documents in the context of civil litigation against the Government. By nonetheless refusing to disclose the documents, the Government essentially advocates a return to pre-FOIA standards, expressly rejected by Congress, allowing withholding whenever an agency claimed "good cause" or a "public interest" for doing so. *See* p. 14, *supra*.

#### 1. The Deliberative Process Privilege Does Not Apply to the Withheld Documents Because the Tribes Are Self-Interested Advocates, Not Neutral Consultants

With regard to each of the seven challenged documents, the Government relies primarily on the "deliberative process privilege" to justify its refusal to disclose them (Govt. Br. 20). *See also* App., *infra*, 1a. This privilege is of recent vintage, developed significantly only in the last twenty years and tracing its origin to a 1958 Court of Claims decision that held "intra-office advice on policy" is privileged from discovery to encourage "the policy of open, frank discussion between subordinate and chief concerning administrative action." *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958); *see generally* 26A C. Wright & K. Graham, *Federal Practice and Procedure* § 5680 at 125-26 (1992). As such, courts have limited application of the privilege to

"intra-governmental communications" that are "predecisional," – *i.e.*, "generated before the adoption of an agency's policy or decision" – and "deliberative" – *i.e.*, "containing opinions, recommendations, or advice about agency policies." *Id.* at 133-35 (collected cases).

This Court has held that FOIA Exemption 5 incorporates a deliberative process privilege in order "to prevent injury to the quality of agency decisions." *NLRB*, 421 U.S. at 151; *accord, e.g., EPA*, 410 U.S. at 91. This Court has also stated that the "purpose of the privilege for predecisional deliberations is to ensure that a decision maker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank." *Federal Open Market*, 443 U.S. at 359-360. The Court, however, has never delineated the precise contours of the deliberative process privilege. Nonetheless, the drafters of FOIA Exemption 5 stated clearly their intent to "delimit the exception as narrowly as consistent with efficient Government operation" (S. Rep. No. 813, *supra* at 10), and interpretations of Exemption 5 are "an important source of law on the scope of the [deliberative process] privilege" (2 S. Stone & R. Taylor, *Testimonial Privileges* § 9.26 at 9-24 (2d ed. 1993)).

Because the deliberative process privilege is designed to protect "intra-governmental" communications, communications with persons outside the agency are generally unprotected. *See, e.g., ITT World Comm., Inc. v. FCC*, 699 F.2d 1219, 1238 (D.C. Cir. 1983), *rev'd on other grounds*, 466 U.S. 463 (1984). In discovery disputes, however, some



courts of appeals have stretched the "intra-governmental" requirement to include some outside "consultants." *See, e.g., First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 468 (D.C. Cir. 1994); 26A Wright & Graham, *supra*, § 5680 at 135-36 (collected cases). A number of courts of appeals have likewise expanded the concept of "intra-governmental" communications in the specific context of FOIA litigation. *See* note 11, *infra*. None of these cases where the "intra-governmental" or "intra-agency" requirement was expanded, however, involved communications from interested "consultants" who stood to benefit from the outcome of the agency decision for which they were consulted.

Those courts that have expanded the intra-agency requirement have generally done so because in some instances a government agency requires information that it is unable to obtain from its own staff, and therefore, it must retain neutral experts outside the agency to obtain information. This retention of neutral experts is generally regarded as the equivalent of obtaining advice from staff assistants. This arrangement is obviously necessary in order to prevent the creation of an uncontrollably large federal bureaucracy. It would be wasteful and unwieldy (if not impossible) for agencies to permanently employ a wide range of experts in anticipation of uncertain needs. *See* 74 Col.L.Rev. at 941-942 (1974). In addition, the D.C. Circuit has noted that experts may not be candid with the agency (or will be unwilling to provide the agency with information at all) unless the expert's opinions and advice can be given "without fear of publicity." *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).

This use of unbiased, neutral outside experts, however, stands in stark contrast to an agency's consultation with a party that has a particular interest in the agency's policy or decision. Under those circumstances, disclosure protections are not necessary to induce the entity's provision of information to the agency, because the party's self-interest in the outcome of the decision presents an incentive for a full exposition of the party's views. This incentive should be more than ample to overcome any inhibiting effects of disclosure. *See* Note, *Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv.L.Rev. 1047, 1065 (1973). Even the Government acknowledges this possibility. *See* Govt. Br. 36-37.

The "functional test" that has been created and applied by several of the courts of appeals to expand the inter/intra-agency requirement of Exemption 5 is not expressly set forth in the statutory language. None of the cases in which the functional test was satisfied involved communications from "consultants" who had a direct and personal interest in the outcome of the agency decision for which their "advice" was given.[11] None of these

[11] *See, e.g., Formaldehyde Institute v. Department of Health & Human Servs.*, 889 F.2d 1118 (D.C. Cir. 1989) (review letter submitted by scholarly journal's review panel to Dept. of Health & Human Services); *Public Citizen, Inc. v. Dept. of Justice*, 111 F.3d 168, 177 (D.C. Cir. 1997) (communications between former President Bush and National Archives and Records Administration); *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) (report prepared by consultant retained by the Office of Federal Contract Compliance Programs); *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980) (non-factual portions of congressional responses to Justice Department questionnaires); *Wu v. National Endowment for the Humanities*, 460 F.2d 1030 (5th Cir. 1972), *cert. denied*, 410 U.S. 926 (1973) (report prepared by consultants retained by National Endowment for the Humanities); and *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (report prepared by panel of experts convened by Office of Science and Technology).



consultants, moreover, had existing or potential adversarial relationships with the involved agencies, or with other stakeholders that had an interest in the agency decision for which the "consultant" had provided input. This case, thus, is quite distinguishable from those where the "functional test" has been applied.

Here, the Tribes have asserted conflicting claims against the Association, and the Tribes have a direct interest in the subject matter of the consultations – e.g., Interior's decisions with respect to the KPOP, and its decisions regarding the scope and extent of the various claims to be filed and pursued by the United States in the adjudication. The Tribes' direct interest in the outcomes of the decisions for which their "advice" is offered is entirely dissimilar to the advice from staff assistants and the exchange of ideas among agency personnel that is the object of Exemption 5. Indeed, this case is replete with evidence that the Tribes are non-neutral, interested parties who seek to benefit from favorable decisions by Interior agencies regarding Klamath Project operations, which would conversely be to the detriment of the Project irrigators. J.A. 67-68; Pet. App. 2a. The Tribes, moreover, are past, present, and potential future adversaries of both Interior and the Project irrigators with respect to the decisions being made in the KPOP and the adjudication. *See* J.A. 71-72, 85, 89-101, 115-135. In fact, it contravenes

common sense that the Tribes will be more candid and honest if their communications are secret. Instead, the Tribes will be even more motivated, under a guarantee of secrecy, to raise the level and tenor of their advocacy.[12]

Similarly, several documents withheld by the Government were supplied by an attorney hired by the Klamath Tribe to individually represent and protect the Tribe's interests. J.A. 40-46; App. 1a, *infra*. The Tribe's attorney is not an attorney for the BIA, and therefore, has an undivided loyalty to vigorously represent the interest of the Tribe as his client. *See Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (a lawyer must "faithfully protect . . . the rightful interests of his clients"); *see also Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976) (an attorney's duty is one of "undivided loyalty which an attorney owes to each of his clients"); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 161 (3rd Cir. 1984) (an attorney owes a client a "duty of vigorous advocacy"). The American Bar Association Model Rules of Professional Conduct, moreover, provide that an attorney "should act with commitment and dedication to the interests of the client and with zeal and advocacy on the

[12] This case is further distinguished from the typical agency relationship involving consultants in that when a party retains a consultant to address issues outside that party's expertise, there generally is a duty of confidentiality going each way. Specifically, the consultant is normally prohibited under the terms of the retention from divulging to third parties any of the information or conclusions reached in performing the consultant work. Here, however, there are no restrictions on the Tribes divulging or sharing their recommendations and analysis with outside parties.



client's behalf." ABA Model Rules of Professional Conduct, Rule 1.3(1) (1999). Given the Tribe's attorney's duty to vigorously represent the interests of the Tribe (and only the Tribe), the several withheld letters from the Tribe's attorney simply cannot be considered the type of neutral, objective advice that may otherwise be shielded under the deliberative process privilege. These documents necessarily lack the neutrality and objectivity that one would expect from a consultant working for an agency.

In *County of Madison, N.Y. v. United States Dept. of Justice*, 641 F.2d 1036 (1st Cir. 1981), the First Circuit was faced with circumstances similar to the situation presented here, and its decision offers a good model for resolution of this case. In *County of Madison*, the United States asserted the same "functional test" and trustee/fiduciary privilege arguments that it advances here, and those arguments were rejected. *Id.* at 1040-1042. There, the withheld documents were actual settlement correspondence between the Oneida Indian Nation's attorneys and the Department of Justice regarding settlement of a separate Indian claims case brought by the Oneidas against the United States. The county, who was a defendant in a similar suit brought by the Oneidas, sought disclosure of these settlement correspondence documents under FOIA. *Id.* at 1038-1039. The United States acknowledged that the withheld documents were " 'not literally inter- or intra-agency letters.' " *Id.* at 1039. Nonetheless, the United States argued, as it does now, that the court should rely on cases that protect communications from outside consultants, called upon to assist in internal decisionmaking, as precedent for reading Exemption 5 broadly enough to encompass the withheld

documents. *Id.* at 1040. In rejecting this argument, the court stated that it could "perceive of no way . . . to describe the Oneidas' lawyers as 'intra-agency' – that is to say 'within the Department of Justice' – that does not simply omit the term 'intra-agency' from the Act in pursuit of policy ends . . . [and] that expanding exemption five to include self-seeking petitioners 'within' agencies would do more violence to statutory language than Congress' direction permits." *Id.* at 1040-1041. The court also rejected the United States' argument that the documents were protected by Exemption 5 due to its "unique fiduciary relationship with the Oneidas and Indians in general." *Id.* at 1042.

In the instant case, the facts favoring disclosure are significantly more compelling. When the Klamath Basin Tribes communicate with the Government, they have their own interest in mind. The Tribes aggressively advocate government action – the reallocation of water – which they assert would benefit them, and which most surely would be injurious to agricultural communities and the Association's members. The Tribes pursue their ends with every available strategy. They make political overtures to the Office of the Secretary. E.R. 385. They threaten lawsuits. J.A. 72, 83-101, 115-123. They prepare technical reports to support their advocacy. J.A. 115-118; E.R. 345-364. They demand that irrigation diversions be shut off. J.A. 86-89, 122.

The United States seeks to distinguish *County of Madison* on the basis that in this case "there is no litigation between the United States and the Tribes," and "with respect to the documents relating to the Oregon adjudication . . . the Tribes and the United States are in effect co-



partic with an obvious community of interests." Reply Brief for the Petitioners on Petition for Writ, at 8 n.5. The Tribes however, expressly threatened to sue Interior on at leas four occasions before, during, and after the KPOP proces, and the period covered by the FOIA requests in issue. J.A. 72, 85, 89-101, 119-123. Just as in *County of Madison*, therefore, the Klamath Basin Tribes were, and remair, potential adversaries to Interior. In addition, the United States cannot fairly claim that it has a singular "community of interests" with the Klamath Tribe in the adjudication given its contemporaneous obligations to file clams for and consider the interests of the Klamath Project irrigators in the adjudication. In any event, by orderirg the disclosure of actual settlement communications, which should be the least subject to disclosure, *County of Madison* emphasized the importance of adhering to he plain language of the FOIA, and of construing FOIA Exemption 5 narrowly.

The United States also asserts that the D.C. Circuit's decisio in the *Public Citizen* case supports its position, noting hat the court there found Exemption 5 applicable to protect correspondence between the National Archives and former Presidents Ronald Reagan and George Bush relating to access to their respective presidential records. 111 F.3d at 169. Govt. Br. 30-31, 41. The plaintiffs there argued that the former president "has a distinct and independent interest that makes him an adversary," *id.* at 171, but offered no objective evidence of an adversarial relationship. The court explained that "[a]t some point, of course, features of the other relationships (above all, a

possible future adversary one) might come to eclipse the consultative relationship, but plaintiff has offered nothing concrete to suggest any movement in that direction here." *Id.* Lacking any concrete evidence of an adversarial relationship, the court found that "the potential for an adversary relationship is not enough to negate one of consultation." *Id.*

Unlike the role played by the former presidents under the Presidential Records Act, 44 U.S.C. §§ 2201-2207 (1994), in consulting in connection with the proper disposition of their records, here, there is overwhelming evidence of the Tribes' advocacy-based and oftentimes adversarial relationship with Interior, and these features have clearly eclipsed any neutral consultative relationship that may otherwise have existed. As a result, the *Public Citizen* case undercuts the United States' argument that the Tribes stand in the role of consultants for the purposes of the FOIA Exemption 5. The Klamath Basin Tribes' relationship with Interior and the Association regarding the water rights disputes in the Klamath River Basin, preclude the possibility of any truly neutral consultative role that the Tribes may have in the United States' deliberations pertaining to the KPOP and the adjudication processes.

For the foregoing reasons, if the Association filed a lawsuit against Interior regarding the KPOP and served discovery requests for copies of correspondence between Tribes and Interior agencies, the documents would not be shielded by the deliberative process privilege. The same would be true if the Association sought disclosure of the documents from Interior in the context of the adjudication. Accordingly, the seven withheld documents are not



normally privileged in the context of civil litigation against the United States, and the documents, therefore, do not qualify as intra-agency communications that are exempt from disclosure under Exemption 5.

### 2. A Trustee-Beneficiary Relationship Does Not Give Rise to a Privilege Against Judicial Discovery, and Does Not Otherwise Qualify the Withheld Documents As Intra-Agency Communications

The Government repeatedly emphasizes (Govt. Br. 4-5, 10, 17, 34-38) its trust responsibility to protect Indian tribe resources and an asserted duty of confidentiality that accompanies this responsibility. *See also Nevada*, 463 U.S. at 128; *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). Stripped to its essence, the Government's claim in this case is that this trust relationship is sufficient to satisfy the intra-agency test, and trigger an exemption to FOIA disclosure. Govt. Br. 34. Primarily because the trustee-beneficiary relationship confers no privilege against disclosure, the Government's argument is wholly without merit.

*First*, there is no privilege against disclosure of trustee-beneficiary communications.[13] While it is true that trust responsibilities include a duty of confidentiality

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[13] Indeed the Government itself appears to be well aware of this fact by expressly acknowledging that it "has never asserted a 'trustee-beneficiary' privilege as a basis for finding that the documents satisfy the *second* requirement of Exemption 5 – *i.e.*, that they are 'not available by law in litigation.' " *See* Reply Brief for the Petitioners on Petition for Writ, 9 (emphasis in original).

(*see, e.g.*, 5 W. Fratcher, *Scott on Trusts* § 505 (4th ed. 1989)), it is also black letter law that "the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege." 8 *Wigmore on Evidence* § 2286, at 528 (J. McNaughton rev. 1961); *accord, e.g.*, 2 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 171, at 224-25 (1994). Thus, "in the absence of a statute to the contrary a confidential communication between partners, or to a clerk, *trustee*, commercial agency, banker, journalist, broker, employee of an adjustment bureau, surety, accountant, or to any other person . . . is not privileged from disclosure." 8 *Wigmore on Evidence* § 2286, at 529-30 (emphasis added). This Court, and numerous lower federal courts, have recognized this basic principle and have consistently refused to create privileges simply because the assertedly privileged communication was "confidential." *See, e.g., University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (applying this principle in finding no federal privilege for confidential peer review materials); *Couch v. United States*, 409 U.S. 322, 335 (1973) (no privilege for confidential accountant-client communications); *Branzburg v. Hayes*, 408 U.S. 665, 681 n.21 (1972) (no reporter's privilege against grand jury testimony); *FCC v. Schreiber*, 381 U.S. 279, 296 (1965) (no privilege against disclosure of confidential documents to the FCC); *O'Neil v. Q.L.C.R.I., Inc.*, 750 F. Supp. 551, 556 (D.R.I. 1990) (no banker-customer privilege); *Krumme v. West Point-Pepperell, Inc.*, 735 F. Supp. 575, 579 (S.D.N.Y. 1990) (no actuary-client privilege).[14]

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[14] Even the (unprivileged) duty of confidentiality that is owed by a trustee to a beneficiary is a qualified one. The trustee is not required to maintain confidentiality simply for its own sake, but, rather may not disclose information obtained from the beneficiary where the trustee "should know that the effect of such disclosure would be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts § 170 cmt. s (1959). Thus, this duty is typically breached where the trustee discloses confidential information to a third party that results in a pecuniary loss to the beneficiary. *See generally* 5 *Scott on Trusts* § 505. Here, the government has not demonstrated any such potential harm to the Tribes that would be caused by disclosure of the documents at issue. Instead, it apparently argues that the "harm" is the disclosure itself. *See, e.g.*, Govt. Br. 34.



Thus, it is simply not true that the disclosure of the documents at issue imposes upon the Indian tribes some unique "Hobson's choice" (Govt. Br. 34-36). To the contrary, the Tribes face the same risk that *every other* beneficiary reporting information to a trustee faces: in litigation, that information, however "confidential," enjoys no special privilege from production. Therefore, whatever chilling effect the possibility of this disclosure might have on the Tribes' willingness to disclose information to the Government (Pet. Br. 36-37), that chilling effect is likewise no different from that experienced by *any other* beneficiary.

*Second*, as Justice Douglas observed twenty-five years ago, "the Freedom of Information Act creates no privileges." *Chamber of Commerce of the U.S. v. Legal Aid Soc'y of Alameda Cty.*, 423 U.S. 1309, 1310 (1975) (Douglas, J. as Circuit Justice); *accord, e.g., Badhwar v. United States Dep't of the Air Force*, 829 F.2d 182, 184 (D.C. Cir. 1987); *Ass'n for Women in Science v. Califano*, 566 F.2d 339, 342 (D.C. Cir. 1977). Thus, to decide whether federal courts should recognize a novel "trustee-beneficiary" privilege in this

FOIA litigation would be improper, as Exemption 5 does not create "novel privilege[s]" or take cognizance of privileges that have "found less than universal acceptance." *United States v. Weber Aircraft Corp.*, 465 U.S. at 801.

*Third*, this Court has clearly held that, where Congress has imposed on the Secretary of the Interior a duty "to carry water on at least two shoulders," the government "cannot follow the fastidious standards of a private fiduciary" when performing its trust duties to Indian tribes. *Nevada v. United States*, 463 U.S. at 128. Here, Congress has "obliged [the government] to represent other interests" (*id.*) – namely, the polity's interest in open government – by requiring the Secretary to comply with FOIA's broad disclosure requirements even while performing trust obligations to Indian tribes. Thus, even with respect to the unprivileged duty of confidentiality, the government "does not 'compromise' its obligation" to the tribes "by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do." *Id.*[15] Indeed, even Interior's own operating manual recognizes that "information

[15] *See also Skokomish Indian Tribe v. Federal Energy Regulatory Comm'n*, 121 F.3d 1303, 1308-09 (9th Cir. 1997) (Indian Tribes not afforded "greater rights than they would otherwise have under [Federal Power Act] and its implementing regulations."); *Morongo Band of Indians v. Federal Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998) ("Although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.").



received [from Indian tribes] shall be deemed confidential, *unless otherwise provided by applicable law.*" J.A. 58 (emphasis added). Similarly, the Memorandum of Agreement between the Tribes and Interior regarding the KPOP states: "Nothing in this Agreement is intended to or shall have the effect of constraining or limiting the United States in carrying out its obligations under law . . . " J.A. 64. Furthermore, promises of confidentiality by Interior could never, in themselves, create an exemption from FOIA disclosure, absent a return to the pre-FOIA days of non-disclosure for "good cause found." *See* p. 14, *supra*.

In this same vein, this Court's decision in *Nevada v. United States* clearly recognizes the United States' dual obligations toward its Indian interests and its reclamation project contractors, by rejecting the argument that the Government's trust obligations to the tribes prevented it from fulfilling other important obligations to irrigators under the Reclamation Act of 1902, 32 Stat. 388. While acknowledging the " 'distinctive obligation of trust incumbent upon the Government in its dealing with Indian tribes' " (463 U.S. at 127 (internal citation omitted)), the Court also noted that "Congress, in its wisdom, when it enacted the Reclamation Act of 1902, required the Secretary of the Interior to assume substantial obligations with respect to the reclamation of arid lands in the western part of the United States." *Id.* at 128; *see also id.* at 142 (acknowledging government's "duty to obtain water rights for reclamation projects").

The Government argues that the Klamath Tribe is placed "at a distinct disadvantage vis-à-vis other claimants in the Oregon adjudication" because the Tribe's communications with the United States will be subject to

disclosure, while the other claimants may assert all available privileges for communications between themselves and their representatives (Govt. Br. 16, 43). Such assertions, of course, ignore the fact that Interior has disclosed correspondence between the United States and the Association's members regarding the very same matters in issue here. J.A. 81, 102-110; Pet. App. 37a. This one-way street created by Interior indicates a failure to acknowledge Interior's competing obligations toward the Klamath Basin Tribes and its Klamath Project contractors. In addition, the United States is contemporaneously pursuing its Project water rights claims for its own benefit, and the benefit of Project landowners and irrigators, and both the irrigators and the Tribe are represented by their own attorneys in the adjudication. *See* p. 7, *supra*. Thus, the Klamath Tribe may still assert all available privileges regarding correspondence with its own attorneys and expert consultants in the adjudication, just as the irrigators may with their attorneys and experts. Accordingly, rejecting the Government's attempt to expand Exemption 5 in this case will simply place the Association members and the Tribe on equal footing with regard to their correspondence with the United States in the adjudication, as well as the KPOP.[16]

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[16] Any implication, moreover, that the documents are privileged simply because the BIA (and not some other Interior agency) is the recipient is incorrect. Govt. Br. 46-47. In this regard, the Secretary of the Interior has the responsibility and power to direct and supervise all the duties of the United States relating to Indian tribes. 43 U.S.C. § 1457. While the BIA manages the day-to-day issues arising from the government's broad trust obligation to the tribes, each bureau of the Department of the Interior shares the same general trust



*Fourth*, Congress has long been aware that FOIA requires agencies to disclose certain Indian trust information. And, despite requests from Interior and tribal interests, Congress has declined to amend FOIA to exempt the type of information that the Government now seeks to withhold. In 1976, Senator Domenici introduced S. 2652, which proposed a tenth exemption to FOIA that would exempt from disclosure "information held by a Federal agency as trustee, regarding the natural resources or other assets of Indian tribes or band or groups or individual members thereof." *See Indian Amendment to Freedom of Information Act: Hearings on S. 2652 Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, United States Senate, 94th Cong., 2nd Sess. (1976) (hereinafter "Hearings on S. 2652"). In hearings before the Senate Committee on Interior and Insular Affairs, Senator Domenici stated, and the Committee agreed, that "disclosure required under the Freedom of Information

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obligations. *See, e.g., Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973); *see also* F. Cohen, *Handbook of Federal Indian Law*, Ch. 3, Sec. C2c, at 225 (1982 ed.) (noting that government's trust obligations not limited to BIA). Interior has established policies and procedures regarding Indian trust responsibilities that apply uniformly to all department offices and bureaus to follow. *See* Department of Interior Manual, Part 512, Ch. 2, "Departmental Responsibility for Indian Trust Resources." J.A. 55-56. Moreover, every bureau of Interior reports to the Secretary. Thus, when the government's trust responsibility to tribes is discussed in terms of the "Secretary of the Interior," that title necessarily encompasses all the bureaus within Interior. *See* 43 U.S.C. § 1457. Accordingly, tribes cannot establish a privilege for their communications as against other bureaus in Interior simply by directing the documents to the BIA.

Act applies to information acquired or held by the government by virtue of the Trust Relationship just as it does to all other nonexempt information." Hearings on S. 2652 at 1, 2, 11. Indeed, Interior recognized that FOIA's existing exemptions did not allow withholding of such information and asked the Committee to address the "problem" of perceived conflicting obligations to tribal interests and third parties seeking documents under FOIA. *Id.* at 6-9. Notwithstanding Interior's requests to protect Indian trust information, Congress did not enact S. 2652.

Two years later, Congress again considered a bill designed to protect Indian trust information – the "Indian Trust Information Protection Act of 1978." S. 2773, 95th Cong., 2d Sess. (1978). The proposed Trust Information Protection Act would have prohibited the disclosure of information held by the federal government in its trust capacity. *Id.* at § 2(b). Had this legislation been enacted, FOIA Exemption 3, which allows agencies to withhold information "specifically exempted from disclosure by statute" (5 U.S.C. § 552(b)(3)), would have prevented agency release of trust information. But the Trust Information Protection Act, like the proposed FOIA amendment, failed to gain Congress' support. *See Indian Law Resource Center v. Department of the Interior*, 477 F. Supp. 144, 147 n.3 (D.D.C. 1979).

Where "Congress has considered extending various forms of limited protection" contained in a statutory scheme, but has "explicitly refused" to do so, this Court has declined to accomplish the extension by judicial decision. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489



U.S. 141, 167 (1989). The Court should likewise refuse to engraft a twice-rejected enactment onto FOIA here.

In summary, the Government's attempt to expand the reach of Exemption 5 to protect its communications with Indian Tribes that occur within the purview of their trust relationship would, for all practical purposes, implicate nearly all communications between Indian Tribes and the United States. This expansion of Exemption 5 ignores the general trustee-beneficiary principles, which do not provide for a trustee-beneficiary privilege, and is directly contrary to Congress' and this Court's mandates that FOIA's exemptions must be narrowly construed. Moreover, this expansion is particularly unnecessary given the other FOIA exemptions that could apply under other circumstances to protect communications that the United States seeks to withhold. *See* note 10, *infra*. For the foregoing reasons, this Court should not countenance the Government's assertion that its trust relationship with the Tribes satisfies the intra-agency test, or otherwise provides a privilege against disclosure, under FOIA Exemption 5.

### 3. The Government Studiously Avoids Claiming an Attorney-Client Relationship Because the Government's and the Tribes' Interests Are Not Aligned and Potentially Conflict

While the Government repeatedly states that it performs "representational functions" for the Tribes (Govt. Br. 18, 25, 29, 33, 39, 42-43, 45), it has studiously avoided any claim that it maintains an attorney-client relationship

with the Tribes. The fact that the Government does not serve as the Tribes' attorney, even as it regularly represents their interests, further demonstrates the lack of singularity of interest between the Government and the Tribes, and the inappropriateness of viewing their communications as intra-agency in nature.

By undertaking an attorney-client relationship, the government would lose the ability to advocate water right allocations that best served its varying duties and responsibilities with regard to federal reserved rights and reclamation project water rights. The government "often represents varied interests in litigation involving water rights," *Arizona v. California*, 460 U.S. 605, 627 (1983); *see also United States v. Nevada*, 412 U.S. 534, 536 (1973), and has "responsibility to advance, at the same time, the national interest in land and water use as well as the interests of the Indians for whom the government acts as trustee." F. Cohen, *Handbook of Federal Indian Law* 597 (1982). Courts have noted that "Tribal interests may not coincide with national interests." *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977). Further, "whatever allegiance the government owes to the tribes as trustee is necessarily split among the . . . competing tribes involved in the case." *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986).

The Government could not continue this essential role of balancing many interests, and also fulfill its duty of loyalty to the Tribes that lies at the heart of the attorney-client relationship. *See generally* Restatement (Third) of the Law Governing Lawyers ch. 8 (2000); ABA, Model Rules of Professional Conduct 1.7, 1.8, & 1.9. Here, the



Government is representing various conflicting interests in the adjudication. The Government is pursuing federal "reserved" water rights claims (such as tribal, national forests, wildlife refuges), and is simultaneously pursuing its claims to assert and protect irrigation water rights in the Klamath Project. In addition, Interior is attempting to resolve disputes among the many competing interests in carrying out its decisions under the KPOPs. These decisions involve considering the Klamath Tribe's demands that more water be held back in Upper Klamath Lake, against the three downstream tribes' demands that more water be released to the Klamath River to provide greater instream flows. Pet. App. 2a. Indeed, all of the Tribes are ably represented by their own legal counsel who press their interests in the KPOP, and the Klamath Tribe has its own attorneys in the adjudication. J.A. 80.

Accordingly, the fact that the Government does not maintain an attorney-client relationship with the Tribes is consistent with the same divergence of interests that prevents their communications from being intra-agency in nature.

**4. Any Assertion of Work Product Privilege Is Foreclosed by the Absence of Common Interest Between the Government and the Tribes**

The Government asserts that two of the seven documents are protected from disclosure because they are attorney work-product. Govt. Br. 12, 28, 42-43; J.A. 40, 44. An attorney for the Klamath Tribe prepared both of these

documents and transmitted them to the Government. J.A. 40-41, 44-45. One discusses the KPOP, and the other discusses the adjudication. *See* note 7, *infra*; App., *infra*, 1a. Even if these memoranda could be considered the work product of the Klamath Tribe's attorney, the attorney's decision to disclose them to the Government waived any work product protection because there is not a sufficient "common interest" between the Government and the Tribe to preserve the privilege.

An extension of the joint defense privilege, the common interest privilege was first recognized in the context of criminal co-defendants whose attorneys shared information in the course of devising a joint strategy for their clients' defense. *See, e.g., Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871); *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989). The privilege has since been applied in both civil and criminal cases, and to jointly interested defendants and plaintiffs. *See, e.g., In re Grand Jury Subpoenas 98-3 and 89-4*, 902 F.2d 244 (4th Cir. 1990) (civil co-defendants); *In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981) (potential co-parties to prospective litigation); *Schachar v. American Academy of Ophthalmology*, 106 F.R.D. 187 (N.D. Ill. 1985) (plaintiffs pursuing separate actions in different states); *Transmirra Prods. Corp. v Monsanto Chem. Co.*, 26 F.R.D. 572 (S.D.N.Y. 1960) (civil defendants in separate civil actions). In those cases where the common interest privilege has been applied, the parties seeking its protection have shared information for the purpose of mounting a common defense or prosecution against a common adversary.

The principle is illustrated by *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980). In *AT&T*,



MCI Communications Corp. and the United States had filed essentially identical antitrust suits against AT&T in different federal district courts. *Id.* at 1288. At the Government's request, MCI disclosed explanatory material that would help the Government understand various documents and other evidence obtained from AT&T during discovery in the Government's antitrust suit. *Id.* The explanatory material was MCI attorney work product, which AT&T sought to obtain from the Government by claiming that MCI had waived the protection by disclosure. *Id.* at 1289. The court of appeals rejected AT&T's waiver argument, holding that parties who "anticipate litigation against a common adversary on the same issue or issues" have a "common interest" in "sharing the fruit of the trial preparation efforts." *Id.* at 1299.

The Tribes and the Government share no common interest remotely analogous to that present in *AT&T*. As discussed above (*see* pp. 5-8, *supra*), the Government represents or balances various conflicting interests both in the adjudication and in the KPOP proceedings. Indeed, the Tribes' decision to hire their own counsel and numerous threats of litigation against the Government (Pet. App. 57a) demonstrate that, far from being "common", the Government's and Tribes' interests are potentially adversarial. Federal courts routinely hold that the protections of the work product are waived upon disclosure in a way that exposes the work product to a potential adversary.[17] Thus, this divergence of interests

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[17] *See, e.g, In re Imperial Corp. of Am. Related Litig.*, 167 F.R.D. 447, 454 (S.D.Cal. 1995); *First Pac. Networks, Inc. v. Atlantic Mut. Ins. Co.*, 163 F.R.D. 574, 582 (N.D. Cal. 1995); *Griffith v. Davis*, 161

between the Government and the Tribes, which again highlight why all of the documents withheld by the Government are not properly considered "intra-agency communications," waives any possible work product protection that might otherwise apply to a subset of the documents.

## CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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DECEMBER 13, 2000

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F.R.D. 687, 699 (C.D. Cal. 1995); *Niagra Mohawk Power Corp. v. Stone & Webster Eng'g Corp.*, 125 F.R.D. 578, 590 (N.D.N.Y. 1989); *Chubb Integrated Sys., Ltd. v. Nat'l Bank of Washington*, 103 F.R.D. 52, 63 (D.D.C. 1984).

## APPENDIX A : INDEX TO DOCUMENTS REMAINING IN DISPUTE

| DOCUMENT NUMBER | DATE | FROM | TO | DEFENDANTS' VAUGHN INDEX DESCRIPTION | PRIVILEGE CLAIMED | PROCEEDING CONCERNED |
|---|---|---|---|---|---|---|
| 3/96-168<br>(7 pages) | 1/19/96 | Klamath Tribes Department of Natural Resources (authored by Bud Ullman, atty. for Klamath Tribes; see **E.R. 470**) | Cathy Wilson (BIA); also sent to Office of the Solicitor, Division of Indian Affairs | Seven page position paper discussing legal theories concerning the water rights of the federally recognized Indian tribes of the Klamath Basin. **(J.A. 40)** | Attorney Work-Product and Deliberative Process **(J.A. 40)** | KPOP **(E.R. 470)** |
| 6/96-168<br>(1 page) | 1/24/96 | Cathy Wilson (BIA) | Tom Strekal (BIA), Doug Tedrick (BIA), Richard Cross (atty. for Yurok Tribe), and Bud Ullman (atty. for Klamath Tribes) | One page memorandum. The memorandum contains views on policy the BIA could provide to other governmental agencies concerning the obligation to protect Indian trust assets in developing an operations plan for the Klamath Project. Specifically, the memorandum considers proposing language as guidance regarding the trust responsibility. **(J.A. 42)** | Deliberative Process **(J.R. 42)** | KPOP **(J.A. 42)** |
| 10/96-168<br>(5 pages) | 2/8/96 | Bud Ullman (atty. for Klamath Tribes) | Tom Strekal (BIA) | Five page position paper with fax transmittal sheet. On 12/3/96, the Dept. released the fax transmittal sheet accompanying this documents. The paper expresses views concerning trust resources in light of the Fish and Wildlife Service's proposal regarding listed species and the resulting implications on lake management. **(J.A. 43)** | Deliberative Process **(J.A. 43)** | KPOP **(J.A. 43)** |
| 16/96-201<br>(3 pages) | 5/23/96 | Bud Ullman (atty. for Klamath Tribes) | Lynn Peterson (Regional Solicitor) | Three page letter discussing the Klamath Basin Adjudication. This letter concerns the water rights claims being prepared on behalf of the Klamath Tribes. **(J.A. 44)** | Attorney Work-Product and Deliberative Process **(J.A. 44)** | Adjudication **(J.A. 44-45)** |
| 20/96-201<br>(1 page) | 6/18/96 | Jeff Mitchell (Klamath Tribes) | Stan Speaks (BIA) | One page letter with attachment. Letter references the attachment and highlights the issues therein. Attachment is the three page 5/23/96 letter from Bud Ullman to Lynn Peterson discussing the Klamath Basin Adjudication (identified by FOIA document number 16/96-201). See analysis above regarding the rationale for withholding the attachment. **(J.A. 45)** | Deliberative Process **(J.A. 45)** | Adjudication **(J.A. 46)** |
| 25/96-201<br>(3 pages) | 6/28/96 | Bud Ullman (atty. for Klamath Tribes) | Stan Speaks (BIA) | One page letter with two page attachment. Letter references the attachment and highlights the issues therein. Attachment is the Klamath Tribes' resolution regarding the Tribes' water right claims in the Klamath Basin Adjudication. **(J.A. 46)** | Deliberative Process **(J.A. 46)** | Adjudication **(J.A. 46-47)** |
| 27/96-201<br>(11 pages) | 7/1/96 | Jacob Kahn (Klamath Tribes) | Cathy Wilson (BIA) | Two page memorandum, nine pages of graphs, and a fax transmittal sheet. The memo concerns biological factors affecting trust resources. On 12/27/96, the Dept. released the fax transmittal sheet accompanying this document. **(J.A. 47)** | Deliberative Process **(J.A. 47)** | KPOP **(J.A. 48)** |

Dec 29, 2000

(12)

SUPREME COURT, U.S.
FILED
DEC 29 2000
OFFICE OF THE CLERK

No. 99-1871

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

*v.*

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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## REPLY BRIEF FOR THE PETITIONERS

In our opening brief we explain that Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(5), which shields from compelled disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," is properly construed to cover documents that are prepared by persons outside the government but that play essentially the same role in the agency's decisionmaking process as documents created by an agency employee. We further explain that documents prepared by Indian Tribes to assist the government in managing Indian trust resources fall into that category, and that a blanket requirement that such materials be disclosed would substantially impair the United States' ability to perform its duties as trustee.

Respondent appears to acknowledge that Exemption 5 may under some circumstances appropriately be applied to documents created outside the government. Respondent contends, however, that Exemption 5 does not cover the documents at issue here, chiefly because the Tribes that submitted them to the Bureau of Indian Affairs (BIA) have a "direct interest" in the manner in which the Department of the Interior (DOI) manages the relevant trust resources. In respondent's view, the Klamath Basin Tribes have no special claim to the protection of the United States, but must instead be treated as indistinguishable from competing claimants to Klamath Basin water.

For the reasons that follow, respondent's arguments lack merit. This Court has long recognized that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). In its role *as trustee* for tribal natural resources, the United States is subject to a duty of loyalty separate and distinct from (though not inconsistent with) the general obligation of the

Executive Branch to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. Application of the FOIA in a manner that protects the trust relationship does not accord Indian Tribes an unfair advantage over competing claimants. Rather, the government's acknowledgment of its special trust obligations to Indian Tribes, and its efforts to satisfy the exacting standards that the trustee's role entails, simply reflect the recognition that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

## I. AN INDIAN TRIBE'S "DIRECT INTEREST" IN THE UNITED STATES' MANAGEMENT OF NATURAL RESOURCES HELD IN TRUST BY THE GOVERNMENT DOES NOT PRECLUDE THE APPLICATION OF EXEMPTION 5 TO TRIBAL COMMUNICATIONS

A. Respondent acknowledges (Br. 26-27) that the courts of appeals have frequently upheld the application of Exemption 5 to documents created by outside consultants for use by agency personnel. Respondent contends, however, that those decisions are inapposite here because "[d]irectly interested parties are not the kind of neutral hired experts that some courts of appeals have described as the 'functional equivalent of agency staff' relied upon by agency decisionmakers to provide frank and objective advice." Resp. Br. 18-19.

As our opening brief explains (at 31, 38-39), application of Exemption 5 to documents created outside the government depends in part on whether a basic congruence of interests exists between the agency and the putative consultant. It is likely true that when an agency is selecting a consultant to offer advice on a particular matter, it typically will seek to ensure a congruence of interests by selecting a consultant who has no tangible stake in the agency's decision and, where the agency deems it appropriate, by requiring the consultant to adopt the perspective of the government. It



does not follow, however, that the requisite congruence of interests can never exist in cases where the agency seeks advice and assistance from persons having a direct interest in the agency's performance of its responsibilities. See, *e.g.*, Gov't Br. 29-30 (Justice Department representation of former employees sued in their personal capacities).

*In its role as trustee for tribal resources*, the government "acts in a fiduciary capacity," *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987), and its "conduct * * * should therefore be judged by the most exacting fiduciary standards," *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942); see Gov't Br. 17-18. Within the sphere of the trust relationship, it would seem obvious that the United States' obligation to manage and safeguard tribal property creates a sufficient community of interests to justify reliance on the Tribes as a source of confidential advice and assistance. That is particularly so in light of the fact that preserving the confidentiality of the beneficiary's communications has traditionally been recognized as an integral component of the trustee's duties. See Restatement (Second) of Trusts § 170 cmt. s (1959); Gov't Br. 17, 36-37. Thus, while a person's financial or similar stake in a government decision might sometimes create a sufficient divergence of interests that the agency should not enter into a confidential consultative relationship with that person in the first place (see Gov't Br. 38-39), it is perverse to regard a Tribe's interest in a trust corpus as a basis for refusing to accord confidentiality to its communications with the United States as trustee in the course of a fiduciary relationship that is independently established by law. See Gov't Br. 39-40.[1]

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[1] Respondent contends that the application of Exemption 5 to documents created outside the government has previously been confined to the submissions of "unbiased, neutral outside experts" and has never "involved communications from 'consultants' who had a direct and personal interest in the outcome of the agency decision for which their 'advice' was given." Resp. Br. 28; see *id.* at 27, 28-29. Before the Ninth Circuit's

B. As we explain in our opening brief (at 42-45), the court of appeals' analysis is particularly flawed with respect to the documents pertaining to the Oregon general stream adjudication, where the United States represents the interests of the Klamath Tribes but does not perform any decision-making function. In discussing that adjudication, respondent seeks to convey the impression that the United States performs essentially the same role vis-à-vis respondent and its members that it plays with respect to the Klamath Tribes. See, *e.g.*, Resp. Br. 7-8. That characterization misconceives the nature of the United States' responsibilities.

1. In *United States* v. *Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984), the court of appeals held that the hunting, fishing, and gathering rights reserved to the Klamath Tribes by an 1864 treaty carry with them an implied reservation of water rights, "with a priority date of

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decision in this case, however, the courts of appeals had not suggested that the availability of Exemption 5 was contingent on the willingness of a document's creator to subordinate his own interests and perspective to those of the agency to which the document was submitted. To the contrary, the District of Columbia Circuit has upheld the application of Exemption 5 to situations in which persons outside the agency were consulted precisely because they were believed to have perspectives distinct from those of the relevant FOIA agency. In *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997), the court upheld the application of Exemption 5 to records submitted to the Archivist by former President Bush, and it specifically rejected (see *id.* at 171) the claim that "[t]he existence of independent presidential interests" precluded the formation of an appropriate consultative relationship. In *Ryan* v. *Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the court held that Exemption 5 was properly applied to responses made by various Senators to a questionnaire sent by the Attorney General regarding the process by which nominees for federal district court judgeships were recommended to the President. See *id.* at 784, 789-791. The Senate has a defined constitutional role in the process by which federal judges are selected, see U.S. Const. Art. II, § 2, Cl. 2, and it is scarcely to be expected that an individual Senator in completing such a questionnaire would consider himself obliged to adopt the perspective of the Executive Branch.



immemorial use, sufficient to support exercise of treaty hunting and fishing rights." *Id.* at 1415; see *id.* at 1408-1415; Gov't Br. 8. Those water rights, it should be emphasized, were not gratuitously conferred upon the Tribes by the United States. See *Adair*, 723 F.2d at 1414 ("The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights."). The Tribes have possessed the water rights from "time immemorial," *ibid.*, and they reserved equitable title to those rights as part of the 1864 treaty, in which the Tribes "relinquished [their] aboriginal claim to some 12 million acres of land in return for a reservation of approximately 800,000 acres in south-central Oregon," *id.* at 1398. The resulting arrangement, whereby the United States holds legal title to the water rights and is subject to a consequent duty to act as trustee for the Tribes, is thus a direct result of a bargained-for exchange that has no meaningful analogue in the government's course of dealing with respondent and/or its members.[2]

As one aspect of its duty to act as trustee for tribal natural resources, the federal government has undertaken to represent the Tribes in state proceedings established to determine the surface water rights of all claimants in the Klamath River Basin in Oregon. In that adjudicative proceeding, "any judgment against the United States, as trustee

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[2] Respondent's assertion (Br. 3) that "each Tribe seeks to reallocate Klamath Project water from current irrigation uses to its preferred uses" is at least potentially misleading, insofar as it suggests that the irrigators' claim to water has a preferred or established *legal* status that the Tribes' claims lack. As we explain in the text, the Klamath Tribes have *judicially recognized* water rights for hunting, fishing, and gathering with a priority date ("time immemorial," *Adair*, 723 F.2d at 1414) earlier than any that respondents' members might hope to establish. See also *id.* at 1415 (affirming the district court's holding that "[t]he priority date of Indian rights to water for irrigation and domestic purposes is 1864"). And while the Tribes' water rights have yet to be quantified in any judicial proceeding, the same is true of the rights claimed by respondent's members.

for the Indians, would ordinarily be binding on the Indians." *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 566 n.17 (1983). And while the Tribes retain the right to intervene separately in the state proceeding if they believe that the United States is not adequately representing their interests, see *ibid.*, the ordinary assumption is that the United States —consistent with the general rule that "[t]he trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust," Restatement (Second) of Trusts § 177 (1959)—will diligently litigate on the Tribes' behalf in this and similar state water-rights proceedings. See *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 812 (1976) (noting that "[t]he Government has not abdicated any responsibility fully to defend Indian rights in state court"). A construction of the FOIA that would compromise the United States' ability to act as an effective representative of tribal interests would prevent the system from functioning as Congress intended, notwithstanding the Tribes' theoretical ability to pursue the alternative course of representing themselves.

Insofar as consultation between the Tribes and the government lessens or eliminates the need for the Tribes to pursue separate claims on their own behalf, it substantially furthers the government's performance of its trust responsibilities. Such consultation also assists state adjudicators by reducing the number of competing claims and the consequent need for a state tribunal to resolve disputes between the Tribes and the federal government regarding the scope of tribal trust resources. In the Oregon adjudication, the Klamath Tribes have intervened separately but have, with one minor exception, adopted and incorporated by reference the claims asserted on the Tribes' behalf by the United States.[3]

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[3] The United States has filed 58 claims on the Tribes' behalf, 46 of which have three distinct parts. The Tribes and the United States have disagreed with respect to one part of one of those 46 claims. Thus, out of a total of 150 different claim values (46 claims with three parts each, plus 12 claims with a single value), the Tribes and the United States have agreed on 149.



2. The relationship between the United States and respondent's members in the context of the Oregon adjudication is fundamentally different. Respondent states (Br. 7-8) that "[i]rrigation water users have filed claims for determination of rights for irrigation in the Klamath Project, and the United States has filed parallel water right claims to assert and protect irrigation water rights in the Klamath Project." In asserting claims for the Project, however, the United States has not purported to exercise a fiduciary or similar representative function vis-à-vis respondent or its members. Nor does a comparison of the federal filings in the Oregon adjudication with those submitted by respondent suggest an essential congruence of interests between the two parties. To the contrary, respondent and the government disagree concerning such fundamental questions as the ownership of the relevant water rights. It is true that the interests of the United States and respondent's members may overlap at a very general level, since if greater volumes of water are allocated to the Project as a whole, it is more likely that irrigators will receive the amount of water allocated to them under their individual contracts with the Bureau of Reclamation. But the differences between the parties' legal and factual theories are substantial; and, in any event, the federal government has not purported to litigate *on behalf of* respondent or its members in the Oregon adjudication. Compare *Nevada* v. *United States*, 463 U.S. 110, 140, 142-143 (1983).[4]

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[4] The position of the United States is that the rights to Klamath Project water are owned by the federal government, and that respondent's members may assert an entitlement to Project water only pursuant to contracts with the Bureau of Reclamation. See *Israel* v. *Morton*, 549 F.2d 128, 132-133 (9th Cir. 1977). Respondent has contested the govern-

As this Court observed in *Nevada* v. *United States*, "it may well appear that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands." 463 U.S. at 128. With respect to the pending Oregon general stream adjudication, the United States government's obligation to represent the Klamath Tribes necessarily coexists with the duty to protect other federal interests, including in particular its interests with respect to the Klamath Project. It does not follow, however, that the federal government is subject to a *fiduciary* obligation to every private party (such as respondent or its members) that may as a practical matter be affected by the manner in which the government performs its assigned functions.

C. Respondent observes (Br. 19) that the Administrative Procedure Act (APA) "specifically prohibits ex parte contacts with agency decisionmakers in the context of formal rulemaking and formal adjudication." Respondent contends (Br. 19-23) that ex parte contacts should likewise be prohibited in all contexts (including the filing of claims in the Oregon adjudication and even preliminary steps in the development by the Bureau of Reclamation (BOR) of the Klamath Project Operations Plan (KPOP)) in which federal officials are required to mediate between potentially con-

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ment's claims in the Oregon adjudication and has argued, *inter alia*, that with respect to specified claims "the rights to the use of water * * * lawfully must be issued in the names of [respondent's members] * * *, not to the United States or any agency of the United States." Claim #293, Statement of Contests of Claim and/or Preliminary Evaluation of Claim: Claims of Others 2 (May 2, 2000). That dispute will be resolved in the course of the state adjudication. But the very existence of that disagreement belies respondent's suggestion (Br. 33) that the United States has "file[d] claims for * * * the Klamath Project irrigators in the [Oregon] adjudication."



flicting private interests. That argument is wrong for at least two reasons.

1. Congress specifically limited the APA ban on ex parte contacts to agency proceedings in which a formal hearing is required. See 5 U.S.C. 557(a) and (d)(1); H.R. Rep. No. 880, 94th Cong., 2d Sess. Pt. 1, at 19 (1976). We may assume, arguendo, that even outside the context of formal hearings, an agency's arbitrary decision to consult confidentially with some interested persons but not others might raise due process or other fairness concerns. But where, as here, an agency's willingness to accept confidential submissions from a particular entity is premised on the existence of an established fiduciary relationship, the distinction in treatment cannot plausibly be regarded as arbitrary. Nor, in light of the carefully limited scope of Section 557(d)(1), can the APA reasonably be construed to impose a more general prohibition on confidential communications between agency officials and interested persons outside the government who possess specialized knowledge or expertise. See *New Mexico* v. *EPA*, 114 F.3d 290, 295 (D.C. Cir. 1997); *Sierra Club* v. *Costle*, 657 F.2d 298, 400-404 (D.C. Cir. 1981).[5]

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[5] Contrary to respondent's suggestion (Br. 20, 22), the development of the KPOP by the BOR is not properly characterized as an adjudicative process. The Bureau recognizes, and is currently participating in, the State of Oregon's Klamath Basin Adjudication. At some point, the State will quantify the rights of all claimants to water in the Klamath Basin in Oregon, and the Bureau will revise its operations as necessary to accommodate those determinations. While that adjudication is pending, however, the Bureau must distribute water in a manner consistent with its contractual, statutory, and trust responsibilities. And until the relative entitlements of the various claimants have been finally determined in the state proceeding, BOR must necessarily decide how its various duties are appropriately reconciled. See *Klamath Water Users Protective Ass'n* v. *Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (BOR, in managing the Klamath Project, must ensure that relevant statutory requirements are followed and that Indian treaty rights are upheld; irrigators' contractual rights to Project water are subordinate to applicable statutory and treaty

2. The APA defines the term "ex parte communication" to mean "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 U.S.C. 551(14). If either the APA or the Due Process Clause actually prohibited ex parte communications under the circumstances presented here, the problem would scarcely be solved simply by treating written tribal submissions as subject to disclosure upon request under the FOIA. Rather, extension of the APA ban to the preparation of claims for the Oregon adjudication and/or the development of the KPOP would logically mean that neither the Tribes nor respondent could communicate with the agency orally or in writing regarding those subjects without giving prior notice to all potentially interested parties.[6]

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directives), cert. denied, 121 S. Ct. 44 (2000). The Bureau's acceptance of that responsibility does not amount to an "adjudication" by BOR of competing claims.

If and when the KPOP process culminates in "final agency action" adopting a long-term operations plan, respondent will be free to challenge that decision on procedural and/or substantive grounds. Insofar as respondent's FOIA suit rests on the purported unfairness of the procedures devised by the agency for the long-term operation of the Klamath Project, the suit is in an important sense an attempt to evade the "final agency action" requirement. It is well-established, moreover, that "the needs of a *particular* plaintiff are not relevant to [Exemption 5's] applicability." *Martin* v. *Office of Special Counsel, MSPB*, 819 F.2d 1181, 1184 (D.C. Cir. 1987); see, *e.g.*, *EPA* v. *Mink*, 410 U.S. 73, 86 (1973) ("Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information."). Respondent's FOIA claim thus depends on whether confidential consultation between DOI and the Tribes is inappropriate in some absolute sense—not on whether such consultation imposes particular hardships on respondent or its members.

[6] Respondent's own declarant explained that DOI representatives have routinely conducted separate meetings with irrigation interests and with Tribes during the course of the agency's efforts to develop the KPOP. See J.A. 69-70. The record also makes clear that respondent (and irrigation interests generally) have engaged in extensive written communications with DOI officials regarding the development of the KPOP. See J.A. 106-110.



## II. RESPONDENT OFFERS NO PERSUASIVE GROUND FOR REJECTING THE DISTRICT COURT'S CONCLUSION THAT THE DOCUMENTS AT ISSUE HERE WOULD BE PRIVILEGED FROM DISCLOSURE IN CIVIL DISCOVERY

Both the magistrate judge and the district court concluded that all seven documents at issue in this case are protected by the deliberative-process privilege, and that two are protected by the attorney-work-product privilege. See Pet. App. 31a-32a, 56a-65a; Gov't Br. 12. The court of appeals did not disagree with or even address that holding, but it nevertheless ordered that the documents be released, on the ground that the documents did not fall within the threshold description of "inter-agency or intra-agency memorandums or letters." See Pet. App. 6a-10a; Gov't Br. 12-13. Apparently seeking to defend the court of appeals' judgment on an alternative rationale, respondent argues at length (see Br. 24-48) that the documents cannot be withheld under Exemption 5 because they would not be privileged from discovery in civil litigation. That contention provides no basis for affirming the court of appeals' judgment.

A. Respondent contends (Br. 24-35) that the deliberative-process privilege is inapplicable to the documents at issue here because the privilege is restricted to "intra-governmental communications" (Resp. Br. 26). Respondent correctly asserts that the deliberative-process privilege is characteristically described as covering "intragovernmental or "intra-agency" communications that are deliberative in character and predate the agency's final decision. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (referring to "the generally recognized privilege for confidential intra-agency advisory opinions, disclosure of which

would be injurious to the consultative functions of government.") (citing *Kaiser Aluminum & Chem. Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (Reed, J.)) (ellipses and internal quotation marks omitted); *EPA* v. *Mink*, 410 U.S. 73, 87 (1973) ("the privilege * * * has been held to attach to intragovernmental memoranda"); *Kaiser Aluminum*, 157 F. Supp. at 947 (referring to "the executive privilege for intra-departmental advice").

Respondent does not even contend, however, that for purposes of the deliberative-process privilege, the "intragovernmental" character of disputed documents should be ascertained by means of a test different from that used to determine whether the records constitute "intra-agency memorandums or letters" within the meaning of Exemption 5's threshold requirement. Rather, in asserting that the documents at issue here lack the "intragovernmental" character that the deliberative-process privilege requires, respondent relies on the *same* fact—the Tribes' interest in the outcome of the agency's decisionmaking process—on which the court of appeals based its conclusion that the tribal submissions are not "intra-agency" records within the meaning of Exemption 5. Respondent's argument regarding the scope of the privilege is not so much an alternative rationale for affirming the court of appeals' judgment as an alternative label for the same basic contention—*i.e.*, that the Tribes' tangible stake in the allocation of Klamath Basin water makes them an inappropriate confidential consultant to the DOI. There is no reason whatever to suppose that respondent could prevail on that "alternative" theory if this Court disagrees with the court of appeals' construction and application of Exemption 5's threshold language.

B. Respondent contends that the Tribes are inappropriate consultants for purposes of the deliberative-process privilege because they "are past, present, and potential future adversaries of both [the Department of the] Interior and the Project irrigators with respect to the decisions being



made in the KPOP and the adjudication." Resp. Br. 29; see *id.* at 32-33. At least with respect to the purported adversary relationship between the Tribes and DOI, that characterization rests on tribal officials' occasional references to the possibility of lawsuits against the DOI regarding the operation of the Klamath Project. See *id.* at 32. In any consultative relationship, however, there exists a *possibility* of future litigation between the parties. That certainly is the case with respect to consultations between the Archives and former Presidents concerning the confidentiality of Presidential records, which were at issue in *Public Citizen*. See *Nixon* v. *United States*, 978 F.2d 1269, 1270-1275 (D.C. Cir. 1992) (recounting history of litigation between the United States and former President Nixon regarding public use of the former President's records). Yet the District of Columbia Circuit sustained the application of Exemption 5 to those communications, observing that "[d]octors, lawyers and other expert advisors may find themselves in litigation as either plaintiffs or defendants against those whom they advise (e.g., breach of contract and malpractice claims), but for all that they are still consultants." *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168, 171 (D.C. Cir. 1997). Neither the existence of that possibility, nor tribal officials' occasional allusions to it, negate the enduring fiduciary and consultative relationship that exists between the United States in its role as trustee and the Tribes. See *ibid.* (observing that "there is often a *possibility* of litigation between entities within the executive branch, yet no one has suggested that courts should on this account refuse to apply Exemption 5 to their inter-agency communications") (citation omitted).[7]

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[7] That is particularly so in light of the fact (see Pet. App. 41a-49a; Gov't Br. 11) that six of the seven documents at issue here were submitted to or created by the BIA, the agency most specifically "charged with fulfilling the trust obligations of the United States" to the

The court in *Public Citizen* noted the possibility that an adversary relationship between parties previously engaged in consultation "might come to eclipse the consultative relationship." 111 F.3d at 171. But nothing of that sort has happened here. The fact that the Tribes have disagreed with some aspects of DOI policy does not undermine the essential consultative relationship. Those who are called upon to consult with an agency about the agency's official responsibilities often may express divergent views (just as agency employees themselves may do), and the "give-and-take of the consultative process," *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980), ensures that an agency policymaker can benefit from a range of perspectives before reaching a decision. Respondent does not contend that the Tribes have actually initiated litigation against any federal agency concerning the allocation of water within the Klamath Basin, much less provide any basis for concluding that the relationship between the government as trustee and the tribal beneficiaries has become *predominantly* adversarial.

There is, in particular, no basis for regarding the Tribes and the government–as "adversaries" with respect to the seven documents at issue here. The district court found that "[a]ll the documents played a role in the agency's deliberations" and that "[m]ost of the documents were provided to the agency by the Tribes at the agency's request." Pet. App. 59a. As the dissenting judge in the court of appeals recognized, "these communications spring from a relationship that remains consultative rather than adversarial, a relationship in which the Bureau and Department were seeking the

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Indians. *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968); see also *Nevada* v. *United States*, 463 U.S. at 127, 135-138 n.15. The record materials on which respondent relies (see Br. 32) refer to the possibility of litigation against the BOR.



expertise of the Tribes, rather than opposing them." *Id.* at 25a-26a (Hawkins, J., dissenting).[8]

C. Respondent explains (Br. 35-43) that no recognized "trustee-beneficiary privilege" exists in the civil discovery context. But the government's position in this case has never depended on the existence of such a privilege. Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Thus, if particular documents qualify as "intra-agency memorandums," those documents are protected by Exemption 5 if, but only if, they are "not available by law * * * in litigation"—*i.e.*, are privileged from disclosure in discovery. See Gov't Br. 2, 20-21; *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *FTC* v. *Grolier Inc.*, 462 U.S. 19, 26 (1983); *Sears, Roebuck*, 421 U.S. at 149.[9]

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[8] Respondent's reliance (Br. 31-33) on *County of Madison* v. *United States Department of Justice*, 641 F.2d 1036, 1039-1041 (1st Cir. 1981), is therefore misplaced. In *County of Madison*, the First Circuit held that several documents submitted by an Indian Tribe to the Department of Justice were not "intra-agency" records within the meaning of Exemption 5. The documents at issue in that case, however, were submitted in connection with settlement negotiations concerning the Tribe's lawsuit against the United States. *Id.* at 1038. The records at issue here, by contrast, were submitted not in a setting marked by conflict between the Tribes and the United States, but "as part of a cooperative, consultative relationship mandated by Departmental policy and federal law." Pet. App. 27a (Hawkins, J., dissenting).

[9] Respondent is therefore wrong in suggesting (Br. 43) that under our theory "nearly all communications between Indian Tribes and the United States" would be protected from disclosure by Exemption 5. Many communications unrelated to the government's management of trust resources might fail to satisfy even the threshold requirement that the records in question must constitute "inter-agency or intra-agency memorandums or letters." And even where that threshold requirement is met, the government would be required to demonstrate the applicability of a recognized privilege. Invocation of the deliberative-process privilege, for

The magistrate judge found that all seven documents at issue in this case are covered by the deliberative-process privilege, Pet. App. 56a-61a, and that two of the documents (involving the Oregon adjudication) are covered by the attorney-work-product privilege as well, see *id.* at 61a-65a. The district court adopted the findings and recommendation of the magistrate judge. *Id.* at 31a-32a. The government has never asserted a "trustee-beneficiary privilege" as a basis for finding that the documents satisfy the *second* requirement of Exemption 5—*i.e.*, that they are "not available by law * * * in litigation." Rather, under the "functional test" consistently employed by the courts of appeals, the determination whether particular records are "intra-agency memorandums or letters" (and therefore satisfy the *first* requirement of Exemption 5) depends on whether the private party who submits them is appropriately treated as a confidential consultant. The trustee's well-established duty not to disclose information acquired in administering a trust where disclosure would disserve the beneficiary's interests bears directly on that question. See Gov't Br. 34-37.

It is doubtless true, as respondent suggests (Br. 35-37), that under our theory the government acting in its fiduciary capacity will in some circumstances be permitted to withhold documents that a private trustee would be obliged to disclose. That disparity, however, is the inevitable consequence of the deliberative-process privilege itself—a privilege unique to governmental entities that is designed to safeguard the distinct public interest in the effective performance of official functions. As the seminal decision in *Kaiser Aluminum* explains,

> [i]n the case of governments, the administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the

example, would require a showing that the pertinent records are "predecisional" and "deliberative" in character. See pp. 11-12, *supra*.



> production or non-production of a State paper in a Court of justice) subordinate to the general welfare of the community. Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. *Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen.*

157 F. Supp. at 945-946 (emphasis added; brackets, footnote, and internal quotation marks omitted).[10]

D. In our opening brief we explain (at 34-37) that if tribal submissions to the DOI regarding the management of trust resources are held to fall outside the scope of Exemption 5, the federal government's ability to perform its fiduciary duties will be severely compromised. Respondent's primary answer to that argument is that the wide range of legal

[10] Moreover, the disparity of which respondent complains could arise only in the context of civil discovery in ongoing litigation. In that setting it is possible that records possessed by a federal agency acting in its fiduciary capacity could be withheld pursuant to the deliberative-process privilege, even though a private trustee would be required to produce analogous records in response to an appropriate discovery request. Outside the context of ongoing litigation, however, a private trustee is not subject to any general duty (comparable to the obligation the FOIA places upon federal agencies) to disclose non-privileged materials upon request. The instant FOIA suit is thus a particularly inapt context for respondent's suggestion that DOI's withholding of certain tribal submissions unfairly advantages the Tribes vis-à-vis other beneficiaries. In any event, this Court has recognized that Congress in enacting Exemption 5 specifically intended to incorporate the deliberative-process privilege. See *Sears, Roebuck*, 421 U.S. at 150-151; *Mink*, 410 U.S. at 86; Gov't Br. 19-20. Congress must therefore be assumed to have understood that Exemption 5 would sometimes protect records that would not fall within any of the discovery privileges that apply to wholly private litigation.

obligations to which the United States is subject makes it inevitable that the government in performing its fiduciary role will sometimes deviate from the standards that bind a private trustee.[11] As the Court explained in *Nevada* v. *United States*,

> the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not "compromise" its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

463 U.S. at 128; see Resp. Br. 38.

This Court's decision in *Nevada* v. *United States* logically implies that *if* Congress had specifically required federal agencies to disclose to the public all tribal submissions bearing on the management of trust resources, the DOI would not breach its fiduciary duty to the Tribes by releasing such materials in accordance with that statutory directive. The question in the instant case, however, is not whether Congress *could* redefine the agency's trust obligations in that

[11] Respondent also suggests (Br. 28) that the Tribes' tangible interest in the appropriate management of trust resources will provide an adequate incentive for communications with the government, even if the responsible federal officials are unable to maintain the confidentiality of those submissions. The relevant question, however, is not whether Tribes if confronted with a disclosure requirement would discontinue communications with the government altogether. Rather, the crucial point is that the Tribes would predictably cease to communicate with the government *in the manner that a beneficiary customarily communicates with its trustee*. See Gov't Br. 35-36. A legal regime that induced Tribes to deal with the United States at arm's length would substantially disrupt the trust relationship, even if interaction between the trustee and beneficiary did not cease entirely.



manner, but whether it has done so. The FOIA should not be read to require so drastic a departure from traditional fiduciary standards absent compelling evidence that Congress intended that result.[12]

That interpretive approach is consistent with this Court's longstanding "reluctance to construe the FOIA as silently departing from prior longstanding practice." *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 154

[12] Respondent suggests (Br. 41-42) that a congressional intent to subject tribal submissions to disclosure can be inferred from its failure to enact statutory amendments proposed in 1976 and 1978. The bill proposed in 1976, however, would have created a blanket FOIA exemption for all "information held by a Federal agency as trustee, regarding the natural resources or other assets of Indian tribes or bands or groups or individual members thereof," without regard to the origin of the records and without regard to whether particular documents would fall within any established privilege in civil litigation. See *Indian Amendment to Freedom of Information Act: Hearing Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. 4 (1976) (*1976 Hearing*). The 1978 amendment would have gone even further, prohibiting release of all such information (rather than simply exempting it from compelled disclosure under the FOIA). See Resp. Br. 42. Congress's failure to enact those provisions is in no way inconsistent with our contention that tribal submissions bearing on the government's management of trust property are "intra-agency memorandums or letters" within the meaning of Exemption 5 that may be withheld from disclosure under the FOIA *if* they fall within a recognized discovery privilege. Cf. note 9, *supra*. Contrary to respondent's suggestion (Br. 42), DOI did not take the position in the 1976 congressional hearings that tribal submissions of the sort at issue here were unprotected by an existing FOIA exemption. To the contrary, the agency specifically noted the possibility that some documents bearing on the management of trust resources might be covered by Exemption 5, while warning that reliance on that exemption was "an unclear and inconclusive prospect, and it invites continuous appeals and litigation." *1976 Hearing* 9. During the years since 1976, a considerable body of law has developed regarding the application of Exemption 5 to documents that were created outside an agency but that played much the same role in the agency's decisionmaking process as documents prepared by an agency employee. See Gov't Br. 21.

(1980); see Gov't Br. 28-29.[13] Our position is also consistent with the numerous court of appeals decisions recognizing that documents submitted by persons outside the government may be withheld under Exemption 5 when release would impair the agency's decisionmaking process (and thus its ultimate performance of official responsibilities). See Gov't Br. 21. Although competing statutory obligations might *sometimes* require federal officials acting in a fiduciary capacity to deviate from the norms that govern private trustees, ambiguous language in a law of general applicability should not be read to compel the wholesale breach of one of a trustee's most fundamental duties.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

DECEMBER 2000

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[13] The Court in *Nevada* v. *United States* observed that "the analogy of a faithless private fiduciary cannot be controlling *for purposes of evaluating the authority of the United States to represent different interests.*" 463 U.S. at 142 (emphasis added). As the italicized language suggests, *Nevada* v. *United States* did not involve a situation in which the federal government was shown to have rendered substantively inadequate representation of tribal interests. Rather, the import of the quoted language is simply that in light of the broad range of the federal government's duties, the United States cannot feasibly be expected to comply with the *prophylactic* rule against representation of potentially competing interests that would bind a private fiduciary. Here, by contrast, respondent seeks to use the FOIA to intrude directly into the trust relationship between the Tribes and the United States, and to compel violations of the duty of confidentiality that lies at the core of that relationship.

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No. 99-1871

***In The Supreme Court of the United States***

NOV 13 2000

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,
Petitioners,

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
Respondent.

***On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit***

# BRIEF OF *AMICUS CURIAE* UNITED SOUTH AND EASTERN TRIBES, INC. ("USET") IN SUPPORT OF THE PETITIONERS

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## QUESTION PRESENTED

Whether Exemption 5 to the FOIA protects records, not otherwise obtainable from the Department of the Interior or from Indian tribes, if those records are shared between the Department and an Indian tribe in furtherance of the trust obligations of the United States to the tribe?

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# BRIEF OF *AMICUS CURIAE* UNITED SOUTH AND EASTERN TRIBES, INC. ("USET") IN SUPPORT OF THE PETITIONERS

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## INTEREST OF *AMICUS CURIAE*

The United South and Eastern Tribes, Inc. ("USET") is an association of twenty-four Indian tribes located in the southern and eastern United States; each of them is recognized by the United States, and to each of them the United States owes trust responsibilities.[1] The Court first

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[1] *Amicus* member tribes are the Alabama-Coushatta Tribe of Texas, the Aroostook Bank of Micmac Indians, the Catawba Indian Nation, the

addressed the trust responsibilities of the United States to Indian tribes almost two hundred years ago in two cases involving a USET member tribe. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (voiding transfer to the state of land guaranteed to the Cherokee Nation by federal treaty and otherwise barring enforcement of state laws on tribal land); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832) (reaffirming duty of federal government to protect assets of the Cherokee Nation). The Court has reiterated these trust responsibilities in cases involving other USET member tribes. *See, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (reiterating trust responsibilities and recognizing federal common law

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Chitimacha Tribe of Louisiana, the Coushatta Tribe of Louisiana, the Eastern Band of Cherokee Indians, the Cayuga Nation, the Houlton Band of Maliseet Indians, the Jena Band of Choctaw Indians, the Mashantucket Pequot Tribe, the Miccosukee Tribe of Florida, the Mississippi Band of Choctaw Indians, the Mohegan Tribe of Connecticut, the Narragansett Indian Tribe, the Oneida Indian Nation, the Passamaquoddy-Indian Township, the Passamaquoddy-Pleasant Point, Penobscot Indian Nation, Poarch Band of Creek Indians, Seminole Tribe of Florida, Seneca Nation of Indians, St. Regis Band of Mohawk Indians, Tunica-Biloxi Tribe of Louisiana, and the Wampanoag Tribe of Gay Head (Aquinnah). Federal recognition of these tribes is reflected at Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13298 (March 13, 2000).

Counsel for the parties have consented to the filing of this *amicus curiae* brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, *Amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *Amicus*, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief.



cause of action under the Trade and Intercourse Act to prohibit transfer of Indian land without federal approval); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (federal government breached its fiduciary duties to tribe by dispersing treaty annuity payments to tribal officials known for mismanagement).

USET has an interest in this Freedom of Information Act case because its outcome could either protect or damage consultations between the United States and Indian tribes. These consultations are essential if the United States is to fulfill its trust responsibilities to Indian tribes.

The United States and Indian tribes have maintained the confidentiality of their trust-related consultations for hundreds of years. These confidential consultations include, but are not limited to, efforts by the United States to meet its fiduciary duties to protect tribal trust assets. The United States has in trust some $3 billion in invested tribal funds, over 54 million acres of tribal land, and large amounts of timber, oil, gas, coal, and water resources belonging to tribes.[2]

Trust consultations between the United States and Indian tribes arise in many different circumstances and involve confidential information. Consultations involve litigation prosecuted by the United States on behalf of, or jointly with, the tribes, such as the state water rights adjudication involved in this case. It also includes the land

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[2] *Indian Trust Funds*, United States General Accounting Office Report to Congress (September 2000) at 3.

claims litigation brought by USET members the Cayuga Nation, the Seneca Nation, the Oneida Nation and the St. Regis Band of Mohawk; the United States has intervened in all of these land claim cases as a co-plaintiff.[3] Trust-related consultations also involve management of tribal trust funds, including funds from land claim settlements of USET members the Aroostook Band of Micmac Indians, the Catawba Indian Nation, the Houlton Band of Maliseet Indians, the Mashantuckett Pequot Tribe, Passamaquoddy-Indian Township, Passamaquoddy-Pleasant Point, and the Penobscot Indian Nation.[4] They also involve management of tribal land held in trust by the United States, including the reservations of the USET members just mentioned and of the Coushatta Tribe of Louisiana, the Eastern Band of Cherokee Indians, the Miccosukee Tribe of Florida, the Mohegan Tribe of Connecticut, the Narragansett Indian Tribe, the Poarch Band of Creek Indians, the Seminole Tribe of Florida, and the Wampanoag Tribe of Gay Head (Aquinnah).[5] In addition, not only do the consultations often concern how best to protect tribal trust assets in

[3] *Cayuga Indian Nation of New York et al. v. State of New York, et al.*, 80cv930 (N.D.N.Y.) (United States motion to intervene granted Nov. 30, 1992); *Oneida Indian Nation of New York et al. v. County of Oneida, et al.*, 74 cv187 (N.D.N.Y.) (United States motion to intervene granted June 3, 1998); *Seneca Nation of Indians v. State of New York, et al.*, 85cv411(W.D.N.Y.) (United States motion to intervene granted January 29, 1998); *Seneca Nation of Indians v. State of New York, et al.*, 93cv688 (W.D.N.Y.) (United States motion to intervene granted on April 28, 1998); *Canadian St. Regis Band of Mohawk Indians, et al. v. State of New York, et al.*, 82cv783 (N.D.N.Y.) (United States motion to intervene granted October 28, 1998).

[4] *See, e.g.*, 25 U.S.C. § 1724.

[5] *See, e.g.*, 25 U.S.C. § 1724(g) and (h).



administrative activities, such as the pending deliberations about the Klamath Project Operations Plan, but they also involve deliberations over whether, to whom and under what conditions USET tribes and other tribes should license, permit, lease or otherwise make available their limited resources to third-parties.

USET submits this brief in support of the position of Petitioners the United States Department of the Interior and the Bureau of Indian Affairs ("Department" and "Bureau") and to urge reversal of the decision of the United States Court of Appeals for the Ninth Circuit. USET agrees with the Petitioners that Exemption 5 to the FOIA protects records shared in consultations between the United States and an Indian tribe in furtherance of their trust relationship. We believe, further, that the law requires protection of those records for other reasons, which can be addressed in this case or left for decision in another.

First, the trust relationship itself is sufficient legal reason to justify a federal agency's decision to withhold confidential records regarding tribal assets held in trust by the United States. As trustee of tribal assets, the United States has a fiduciary duty to maintain the confidentiality of information about trust assets. The question of public access under the FOIA arises *only* because tribes and the United States share records containing confidential information in furtherance of the trust relationship between them. If the FOIA is interpreted to permit the public to obtain these records, it will place the United States in violation of its trust obligations and seriously inhibit communication between tribes and the United States. It is not possible to preserve the

integrity and utility of consultations between trustee and beneficiary and simultaneously to permit the general public to invade the confidentiality of those consultations.

Second, while the Department has invoked only Exemption 5 in this case, other exemptions to the FOIA protect trust records from public disclosure. Exemptions 3, 4 and 7(A) are particularly important to trust records. These exemptions protect records exempt by statute (Exemption 3), records submitted by tribes and containing confidential or privileged commercial or financial information (Exemption 4), or records compiled for law enforcement purposes the disclosure of which could interfere with enforcement proceedings (Exemption 7(A)).



## STATEMENT OF THE CASE

The question presented by the parties in this case is whether records of confidential consultations concerning protection of tribal assets, as to which the United States is a trustee, are "intra-agency" records protected from disclosure by Exemption 5 to the Freedom of Information Act, 5 U.S.C. § 552(b)(5). A divided Court of Appeals for the Ninth Circuit incorrectly held that the statutory term "intra-agency" must be interpreted to exclude these trust records. *Klamath Water Users Assoc. v. The Department of the Interior*, 189 F.3d 1034, 1039 (9th Cir. 1999). Using the trust relationship as a reason for disclosure rather than as a reason for confidentiality, a majority of the panel erroneously reasoned that the "direct interest" of Indian tribes in tribal assets entrusted to the United States requires that records concerning trust-related consultations be disclosed to the public. *Id.* at 1038.

Exemption 5 to the FOIA provides that the Act "does not apply to matters that are . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Court has construed this language to "exempt those documents . . . [that are] normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see also United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) ("[e]xemption 5 simply incorporates civil discovery privileges"); *FTC v. Grolier*, 462 U.S. 19, 26 (1983) (same). Exemption 5 thus incorporates discovery

privileges like the deliberative process, attorney-client, and work product privileges. *NLRB*, 421 U.S. at 149-150.

Here, the parties agree that the records at issue would be protected from discovery in litigation by the deliberative process and attorney work product privileges, as the district court found. Appendix B to Petition for Writ of Certiorari at 31a-32a and 56a-65a. They disagree only with respect to whether these records meet the test of Exemption 5 that they be "inter-agency or intra-agency" records. Respondent asserts that the seven records at issue are not "inter-agency or intra-agency" records because the Klamath Tribes ("Tribes") created six of them and shared them with the Bureau and because the Bureau shared the seventh with the Tribes. The Department demonstrated that all the records were created and shared in furtherance of the Bureau's role, as tribal trustee, in enforcing the Tribes's water rights at the Klamath River Basin. Joint Appendix 33-39.

Respondent "acknowledges the significant fiduciary and trust responsibilities that the United States owes to Tribes." Respondent's Brief in Opposition to the Petition for a Writ of Certiorari at 17. Respondent does not dispute that the Department, through the Bureau, is required by federal law to present water rights claims on behalf of the Tribes in the state adjudication and in the Bureau of Reclamation deliberations regarding Klamath River Basin. Nor does Respondent dispute that the Bureau and the Klamath Tribes prepared the records at issue in the common pursuit of the trust responsibilities of the United States to protect the Tribes' water rights in these state and federal proceedings. *Id.* at 10.



Respondent nevertheless seeks access to the legal and strategic thought processes of the Bureau and the Tribes as reflected in records shared between the Bureau and the Tribes in trust-based consultations. It is undisputed that there would be no access to any of these records if the United States as trustee and the tribes as beneficiary had not shared them. The issue thus presented is whether the decision to share otherwise privileged and confidential records during trust consultations makes those records available to the general public.

## ARGUMENT

### I. THE TRUST RELATIONSHIP IS A SUFFICIENT LEGAL REASON FOR THE DEPARTMENT TO WITHHOLD TRUST RECORDS.

#### A. Trust Records Are Not "Improperly Withheld" Under FOIA.

The FOIA requires public disclosure only of agency records "improperly withheld." *GTE Sylvania v. Consumers Union of the United States*, 445 U.S. 375, 386 (1980) (*quoting* 5 U.S.C. § 552(a)(4)(B)). Records that meet the requirements of any of the nine enumerated exemptions to the FOIA are not improperly withheld. 5 U.S.C. § 552(b)(1)-(9). Further, records are not improperly withheld, even if they meet no particular FOIA exemption, where withholding them is required to satisfy an important governmental obligation independent of FOIA. *GTE Sylvania*, 445 U.S. at 386. In *GTE Sylvania*, this Court held that records not subject to an exemption were not "improperly withheld" because a protective order barred their disclosure. *Id.* The Court explained that the protective order, by enjoining disclosure of the requested records, deprived the agency of discretion to disclose them. *Id.* The Court has since reiterated that records are not "improperly withheld" under FOIA where non-disclosure is required to "serve a critical goal independent of FOIA." *Department of Justice v. Tax Analysts*, 492 U.S. 136, 155 (1989).



The trust obligations of the United States to Indian tribes and individuals require the United States to withhold records shared between them in trust. The trust relationship is intended to protect tribal sovereignty by protecting tribal assets from exploitation or interference. *See, e.g., Cherokee Nation*, 30 U.S. (5 Pet.) at 16. As trustee of tribal assets, the United States is held to "'exacting fiduciary standards.'" *Seminole*, 316 U.S. at 296-97.

Fundamental to the trust relationship is the trustee's "duty to the beneficiary not to disclose to a third person information which he has acquired as trustee when he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts §170 cmt. S (1959). Disclosure of trust records would give rise to a breach of trust claim by the tribe. *See, e.g., Seminole*, 316 U.S. at 297; *United States v. Mitchell*, 463 U.S. 206, 225-6 (1983) (applying common law rules of trust to hold that United States breached its trust obligations to tribe).

Congress expressly exempted from the open records and meetings requirements of the Federal Advisory Committee Act consultations regarding tribal trust fund management between the United States, tribes and tribal associations, such as USET. 25 U.S.C. § 166. Federal law provides that "[t]he activities of the Department of the Interior associated with the Department's consultation with Indian tribes and organizations related to the management of funds held in trust by the United States for Indian tribes shall be exempt from the Federal Advisory Committee Act (5 U.S.C. App.)" *Id.* This statutory prohibition against public

access to trust consultations would be rendered useless were trust records subject to disclosure under the FOIA. Just as federal agencies must withhold records pursuant to a protective order, federal agencies must protect the confidentiality of trust records because they have a fiduciary duty to do so.

### B. Failing to Recognize a FOIA Exemption for Records Shared to Promote Confidential Trust-Related Consultations Would Damage the Trust Relationship, Jeopardize Trust Assets, and Harm Tribes that Depend on Trust Assets for Their Existence.

Failing to recognize a FOIA exemption for records shared to promote confidential trust-related consultations would damage the trust relationship, jeopardize trust assets, and harm tribes that depend on trust assets for their existence. Federal law requires the United States to hold and manage tribal funds in trust accounts,[6] to assert claims to

[6] Section 162a(d) of Title 25 of the United States Code provides that "[t]he Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following: (1) Providing adequate systems for accounting for and reporting trust fund balances. (2) Providing adequate controls over receipts and disbursements. (3) Providing periodic, timely reconciliations to assure the accuracy of accounts. (4) Determining accurate cash balances. (5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis. (6) Establishing consistent, written policies and procedures for trust fund management and accounting. (7) Providing adequate staffing, supervision, and training for trust fund management and accounting. (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands". 25 U.S.C. § 162a(d); *see also* The American Indian Trust Fund Management Reform Act of 1994, P. L 103-412, § 102.



land, water and other trust assets against third-parties,[7] to appropriately manage tribal natural resources,[8] to assist tribes in negotiating commercial and financial agreements with third-parties,[9] and to approve purchases, leases, licenses and other agreements between the tribes and third-parties regarding the sale or use of trust assets.[10]

Federal law also obligates the United States to consult with Indian tribes regarding trust assets.[11] For example, the Secretary of the Interior must account for and advise tribes concerning funds in federal trust accounts, and over 200 tribes have funds held in trust fund accounts managed by the United States, including many USET Tribes.[12] The Secretary must report to each of these tribes

[7] *See, e.g.*, 25 U.S.C. § 177 ("Trade and Intercourse Act" or "Non-Intercourse Act") and § 564m (preserving water rights of Klamath Tribes established by treaty with the United States).

[8] 25 U.S.C. § 162a(d)(8).

[9] *See, e.g.*, 25 U.S.C. § 2106.

[10] *See, e.g.*, 25 U.S.C. §§ 177, 324, 396-396g, 406-407, 415-415d, and 2106.

[11] Federal statutes requiring consultations between the United States and a tribe are consistent with the duties of the United States, as trustee, to share information about trust assets with the beneficiary of the trust, to hear from the beneficiary, and otherwise to act in the beneficiary's best interests. Restatement (Second) of Trusts § 170 (Duty of Loyalty), § 172 (Duty to Account), § 173 (Duty to Furnish Information), § 174 (Duty to Exercise Reasonable Care and Skill over Trust Assets); § 175 (Duty to Take and Keep Control of Trust Assets); § 176 (Duty to Preserve the Trust Assets); and § 177 (Duty to Enforce Claims to Trust Assets).

[12] *See Indian Trust Funds supra* n.2.

with respect to its trust funds "(1) the source, type, and status of the funds; (2) the beginning balance; (3) the gains and losses; (4) the receipts; and (5) disbursements and the ending balance." The American Indian Trust Fund Management Reform Act of 1994, P.L. 103-412, § 102; *see also* 25 U.S.C. § 162a(d)(5) (requiring the Secretary to prepare and supply tribes with statements of account). The Secretary also shall "direct, or by contract, provide Indian tribes with technical assistance in developing, implementing, and managing Indian trust fund investment plans, and [] among other things, ensure that legal, financial, and other expertise of the Department of the Interior has been made fully available in an advisory capacity to the Indian tribes to assist in the development, implementation, and management of investment plans." *Id.* at § 204.[13]

The Minerals Agreement Act is another example of a federal statute that requires consultations between the United States and tribes regarding trust assets. 25 U.S.C. § 2106. This statute provides that the Secretary of the Interior "shall ensure that upon the request of an Indian tribe . . . such tribe shall have available advice, assistance, and information during the negotiation of [an agreement between the tribe and a third-party for purchase or use by the third-party of the tribe's mineral resources]." *Id.* The effectiveness of these laws obviously would be impaired if third-parties have access to statements of trust fund accounts provided by the

[13] *See e.g.* 25 U.S.C. § 1403(b)(1) (providing for legal, financial and other expertise by the Department "in an advisory capacity to the Indian tribe which is entitled to [trust] funds") and § 941i (Catawba land claims settlement fund administration provisions).



United States to tribes, business strategy or negotiating positions recommended to a tribe by the United States, or other communications regarding trust assets between the United States and tribe.

In addition, federal enforcement of claims to trust assets necessitates consultation between the United States and Indian tribes. For instance, the United States has intervened as a plaintiff in land claim lawsuits brought by USET tribes. *See supra* n. 3. These and other claims arise under the Non-Intercourse Act or other federal laws or treaties in which the United States has promised to preserve and protect land for the tribe.[14] Records of these trust consultations include attorney work product such as draft pleadings and briefs, strategy memoranda, appraisals, non-testifying expert reports, draft settlement proposals and other records that have not been shared with the adversary and that would not be discoverable in the litigation. These records also may include attorney-client communications with the United States as counsel to the tribes or with each having separate counsel.[15] Disclosure of these records under the FOIA, simply because they have been shared between the United States and one or more Indian tribes, to further the trust relationship, would deny the United States and the

[14] *See, e.g.*, 25 U.S.C. § 177; Treaty of Canandaigua (November 11, 1794), 7 Stat. 11; *County of Oneida v. Oneida Indian Nation*, 470 U.S. at 239 (declaring that Congress enacted the Non-Intercourse Act to "protect[] the rights of Indians to their properties.") (citation omitted).

[15] Federal law authorizes the United States to serve as legal counsel to Indians. 25 U.S.C. § 175 ("In all States and Territories where there are reservation or allotted Indians the United States shall represent them in all suits at law and in equity.").

tribes the protection afforded by the attorney-client and work product privileges in the cases that have been brought to vindicate the trust relationship.

If the United States and Indian tribes did not share records regarding trust assets, the records would not be available to the public. A third party's access to tribal records is barred by tribal sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (upholding tribal sovereign immunity). The records created and held by the United States alone would be exempt under any reading of Exemption 5 to the FOIA. *Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 360 (1979) (upholding exemption of commercial and financial information generated by the government); *NLRB*, 421 U.S. at 149-50 (upholding exemption of attorney work product and attorney-client communication). To make the United States publicly disclose them because they were shared between the United States and the tribe is inconsistent with the purpose of the trust. *Cherokee*, 30 U.S. (5 Pet.) at 16.

State and local governments, competitors, land owners, developers, customers and other third-parties may use access to this sensitive and valuable information to the economic disadvantage of Indian tribes. This is inevitable because adversaries will know in advance the tribe's legal theories and strategies, as well as the tribe's financial and business plans.

If the communications between the United States and tribes regarding trust assets is to be exposed, the extent and nature of the tribes' interaction with the United States will



predictably become more guarded to avoid harm to tribal assets and thus the tribe. The loss of open and candid communication between the United States and tribes will damage the ability of the United States to properly prosecute claims to trust assets, to assist tribes in negotiating commercial agreements, to invest trust funds productively, to make informed decisions with respect to whether to approve transactions involving the tribe and third-parties, and otherwise to dutifully hold and manage trust assets.

## II. EXEMPTIONS TO THE FOIA NOT INVOKED BY THE DEPARTMENT IN THIS CASE PROTECT TRUST RECORDS SHARED BETWEEN THE UNITED STATES AND AN INDIAN TRIBE.

Other exemptions to the FOIA not invoked by Petitioners protect records shared to promote trust-related consultations between Indian tribes and the United States. Petitioners rely exclusively upon Exemption 5 to the FOIA, which protects privileged agency records from disclosure. USET agrees with Petitioners that Exemption 5's "intra-agency" requirement must be read so as to preserve privileged records shared during consultations between the United States and Indian tribes regarding tribal assets that the United States holds in trust. Exemption 5, however, is not the only exemption to the FOIA that protects records shared in trust from public disclosure. Depending upon the record and the circumstances surrounding it, any of the FOIA exemptions could be a proper basis for an agency to withhold it from the public. Whatever is determined with respect to Exemption 5 in the circumstances of this case

should not affect the applicability of any exemption to any other record shared between the United States and tribes in trust.

### A. Exemption 3 Bars Disclosure of Trust Records.

Exemption 3 to the FOIA incorporates the disclosure prohibitions that are contained in other federal statutes. 5 U.S.C. § 552(b)(3). Exemption 3 mandates non-disclosure of information "specifically exempted from disclosure by [a] statute" that either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.*; *CIA v. Sims*, 471 U.S. 159, 167 (1985).

Statutes incorporating the trust responsibilities of the United States to Indian tribes should qualify as Exemption 3 statutes under Exemption 3(A). *See, e.g.*, 25 U.S.C. §§ 162a(d)(5), 177, 324, 396-396g, 406-407, 415-415d, and 2106. Inherent to statutes imposing trust obligations on the United States is the obligation of a trustee to maintain the confidences shared in the trust relationship. Inasmuch as the United States is duty-bound to withhold confidential information exchanged between it and a tribe under these statutes, it has no discretion to disclose that information. *See supra* Section IA.

There is a specific statute preserving water rights guaranteed by treaty between the United States and the Klamath Tribes. 25 U.S.C. § 564m. This statute implicitly



incorporates the trust obligations of the United States arising under such treaty. It should shield disclosure of the records at issue.

### B. Exemption 4 Bars Disclosure of Trust Records.

Exemption 4 bars disclosure of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Tribal trust asset information is by definition commercial or financial information. Tribes customarily keep confidential business plans and proposals, economic analyses, financial reports, draft transactional documents, and other records regarding their trust assets. For this reason alone, Exemption 4 would apply to these records. *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 948 (D.C. Cir.), *vacated & reh'g en banc granted*, 942 F.2d 799 (D.C. Cir. 1991), *grant of summary judgment to agency aff'd en banc*, 975 F.2d 871 (D.C. Cir. 1992).

In addition, often records regarding tribal trust assets may be privileged from discovery by the attorney-client, work product doctrine or other discovery privileges. *Washington Post Co. v. HHS*, 690 F.2d 252, 267 n.50 (D.C. Cir. 1982). In this regard, those records at issue in this case that are the work product of counsel to Klamath Tribes regarding the Tribe's water rights would qualify for Exemption 4 protection.

A privilege of particular importance to records shared between the United States and Indian tribes in their trust

relationship is the common interest privilege. The common interest privilege, which is incorporated into both Exemptions 4 and 5, is integral to tribal trust asset management. As approved by the Court, the common interest privilege applies to communications made by the client or the client's "lawyer to a lawyer representing another in a matter of common interest." Proposed Fed. R. Evid. 503(b)(3). The Courts of Appeal have applied the common interest privilege to communications regarding current or imminent litigation, *United States v. AT&T*, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980), and to other communications made to facilitate the rendition of legal services to each of the clients involved in the consultation. *See, e.g., Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964).

The common interest privilege is essential to Indian land claims, which often must be prosecuted by the United States to overcome Eleventh Amendment challenges by states. *See supra* n.2. Whether brought by the United States alone or in conjunction with one or more plaintiff tribes, these cases raise complex legal and factual issues regarding trust assets that require open communication between the United States and the tribes regarding otherwise privileged information. In order to advise and consult openly with respect to their common interests regarding tribal trust assets, the parties and their counsel must be assured their communications will be kept confidential.

Cooperation between counsel for the United States and tribes also is necessary to protect tribal water rights. The Klamath Tribes, the Bureau and their counsel prepared and



shared the records at issue here, which are privileged from discovery by the work product doctrine and the deliberative process privilege, in the common pursuit of the Tribe's water rights before the Department and in state court litigation. Whether or not the common interest privilege, which was not asserted below, is now available to protect the records at issue under Exemption 5, the common interest privilege should remain available under both Exemptions 4 and 5 to protect other trust records from disclosure.[16]

### C. Exemption 7 Bars Disclosure of Trust Records.

Exemption 7 applies to trust records shared between the United States and Indian tribes. Exemption 7 provides that records "compiled for law enforcement purposes" are exempt from disclosure if disclosure could result in one of six enumerated harms. 5 U.S.C. § 552(b)(7). Especially relevant to trust records is the harm protected against in Exemption 7(A), which bars disclosure of records when disclosure "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A). This harm flows from disclosure of trust relationship records.

The threshold requirement of Exemption 7 requires records to be "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 157 (1989). Exemption 7's threshold is met

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[16] Preservation of the protection afforded records subject to the common interest privilege is important in other contexts as well, including *qui tam* litigation under the False Claims Act, 31 U.S.C. § 3730.

easily by records shared between the United States and tribes to enforce laws protecting tribal trust assets. *See, e.g.* 25 U.S.C. § 162(a)d and 177.

Disclosure of records regarding trust assets would be harmful in ways Exemption 7(A) protects against. Disclosure of trust records "could reasonably be expected to interfere with enforcement proceedings." The term "enforcement proceedings" plainly embraces criminal, civil, and administrative proceedings,[17] whether under federal, state or another jurisdiction,[18] and thus should include land claims and state court water rights adjudications in which the United States is prosecuting claims on behalf of one or more tribes. Inasmuch as the Oregon court adjudication and the Klamath Basin federal administrative proceeding are both still ongoing,[19] Exemption 7(A) should apply to exempt the records at issue.

These and other exemptions to the FOIA, including Exemption 5, should remain available to protect trust records shared between the United States and tribes now and in the future.

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[17] *See, e.g., Manna v. Department of Justice*, 51 F.3d 1158, 1165 (3rd Cir. 1995) (disclosure would interfere with contemplated civil proceedings); *Fedders Corp. v. FTC*, 494 F. Supp. 325, 327-28 (S.D.N.Y.) (concluding that FTC investigation into allegations of unfair advertising and offering of equipment warranties is a law enforcement proceeding), *aff'd*, 646 F.2d 560 (2d Cir. 1980).

[18] *See, e.g., Shaw v. FBI*, 749 F.2d 58, 64 (D.C. Cir. 1984) (holding that "an authorized federal investigation into the commission of state crime qualifies" as a law enforcement proceeding).

[19] Brief of Petitioner in Support of Writ of Certiorari at 10.



## CONCLUSION

The Court should read Exemption 5 to the Freedom of Information Act consistently with the fiduciary and trust responsibilities of the United States to consult confidentially with Indian tribes about tribal assets entrusted to the United States and should hold that records of such consultations are "intra-agency" records protected from public disclosure pursuant to Exemption 5.

Respectfully submitted,

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In The

# Supreme Court of the United States

NOV 13 2000

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,

*Petitioners,*

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF *AMICI CURIAE* OF THE CAMPO BAND OF MISSION INDIANS, EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, LUMMI NATION, PUEBLO OF SAN FELIPE, AND ZUNI INDIAN TRIBE SUPPORTING PETITIONERS

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## BRIEF *AMICI CURIAE* OF THE CAMPO BAND OF MISSION INDIANS, EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, LUMMI NATION, PUEBLO OF SAN FELIPE, AND ZUNI INDIAN TRIBE SUPPORTING PETITIONERS

Pursuant to Sup. Ct. R. 37, the Campo Band of Mission Indians of California, the Eastern Shoshone Tribe of the Wind River Reservation of Wyoming, the Lummi Nation of Washington, the Pueblo of San Felipe of New Mexico, and the Zuni Indian Tribe of New Mexico and Arizona file this brief *amici curiae* in support of the Petitioners in the above-entitled case. Petitioners, the United States Department of the Interior and the Bureau of Indian Affairs, and Respondent, Klamath Water Users Protective Association, have consented in writing to the filing of this brief.[1]

### INTEREST OF *AMICI CURIAE*

The Campo Band of Mission Indians is descended from the Kumeyaay people, who have inhabited what is now southern California and northern Mexico for more than 2,000 years. The Band's Reservation was established by Executive Order in 1893. *See* Act of Jan. 12, 1891, ch. 65, 26 Stat. 712. The Reservation is located approximately fifty miles east of the city of San Diego in the Cuyamaca and Laguna Mountains. The southern boundary of the

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

Reservation is less than a half-mile north of the border between the United States and Mexico.

For centuries, the Kumeyaay migrated throughout the region to take advantage of the abundant natural resources. In an area notable for its lack of rainfall, surface water, wetlands, and numerous small springs were surprisingly plentiful. That changed with the arrival of European settlers. In less than a hundred years, shortsighted grazing, water management, and agricultural practices drastically altered the natural landscape.

Today, the Band's economy is built upon the Reservation's natural resource base and employment opportunities provided by the tribal government. In the future, the Band hopes to exploit its proximity to the booming economic centers of San Diego and Tijuana, Mexico, to develop its commercial and industrial potential. The availability of water will go a long way toward determining whether the Band's endeavor succeeds or fails. Although it is likely that the Band possesses senior rights to the waters of Campo Creek and the Reservation's groundwater supply, those rights have never been quantified. As economic development in the area increases, so too will competition for the area's limited water resources. Because of these development pressures, a water rights adjudication or a negotiated settlement of the tribal claims will become inevitable. In either case, the United States will be obligated to assert and protect the Band's right to water. Because the Band is the only source of information regarding its historical and planned future use of water, the United States will have to consult with the Band to obtain that information, which will be absolutely vital to the establishment of the Band's water right.



The Eastern Shoshone Tribe inhabits the Wind River Reservation in west central Wyoming. The Tribe entered into a Treaty with the United States in 1868. Treaty between the United States and the Eastern Band of Shoshonees and the Bannack Tribe of Indians, July 3, 1868, 15 Stat. 673. The Tribe's natural resource holdings, held in trust for it by the United States, are extensive. In addition to the Tribe's water rights, which were confirmed by this Court in *Wyoming v. United States*, 492 U.S. 406 (1989), the 2.2 million acre Reservation contains rich deposits of oil, gas, coal, gravel, gypsum, and bentonite.

As a tribe particularly reliant upon the development of its natural resource holdings to raise revenue, the Eastern Shoshone Tribe regularly is required to share confidential economic information, in the form of development agreements, with the federal government. If the proprietary information contained in those documents were available to the general public, the Tribe's ability to negotiate competitive agreements for the development of its natural resources would be significantly reduced. For the Eastern Shoshone, which funds ninety per cent of its tribal programs with revenue derived from reservation-based natural resource development, any reduction in those revenues has an immediate impact on its members, fifty-seven per cent of whom live below the poverty level.

Safeguarding the confidentiality of the information that the Tribe shares with the United States protects the Tribe's legal rights as well as its commercial competitiveness. This is especially true in the water rights adjudication that still marches on, twelve years after the Court decided *Wyoming v. United States*. The United States, which represents the Tribe's interests in that litigation,

has been engaged for years in settlement talks on the Tribe's behalf. The Tribe regularly consults with the United States regarding the nature and extent of the water rights to which it believes it is entitled. In addition, tribal personnel gather information and data for the United States' use in the litigation and settlement discussions. Tribal personnel perform this function because they are most intimately acquainted with the Reservation's geography and are most knowledgeable about the sources of such data. If the information that the Tribe provides to the United States were disclosed, the Tribe's ability to obtain a fair and equitable adjudication or settlement of its claims would be jeopardized.

The Lummi Indian Reservation, set aside by Treaty in 1855, is located along the coast of Washington State on the northern-most part of Puget Sound and the southern-most part of the Georgia Straits. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. The Reservation was carved out of lands inhabited by the Lummi people since time immemorial. The Lummi Nation has currently unquantified reserved rights to water to support its historical as well as future homeland needs. The Nation also has Treaty-protected fishing rights and depends on the waters surrounding the Reservation to support the fish population necessary to exercise its Treaty rights.

Water resources within the Lummi Reservation are extremely scarce. Due to man-made barriers permanently erected after the creation of the Reservation and severe surface water quality degradation, the Lummi Nation is basically cut off from access to adequate sources of surface water. As a consequence, the Nation relies primarily on groundwater resources within the Reservation. The



groundwater, however, is in scarce supply, and because of its proximity to the sea is particularly susceptible to contamination from salt water intrusion. For a number of years, the Nation has experienced conflicts with non-Indian residents of the Reservation over use of the scarce groundwater resource. The parties have attempted to negotiate a solution to those groundwater use conflicts, and the Nation has relied on the United States both to assist it in its efforts to resolve those conflicts and to protect its dwindling groundwater supply. The Nation has shared a vast amount of information with its trustee concerning the Nation's economic, cultural, and other homeland interests, including present and future development plans, land use patterns, hydrologic data, fisheries statistics and goals, and other information relevant to development of legal theories necessary to support settlement or litigation efforts by the United States to protect the trust resource. The United States would be unable to develop settlement goals or litigation strategy without this input from tribal staff. In many cases, the Nation is the only source of the necessary information.

The Pueblo of San Felipe is located in central New Mexico along the Rio Grande, approximately equidistant between the city of Albuquerque to the south and the city of Santa Fe to the north. The Pueblo is a vibrant community with a rich cultural history. It continues to occupy its aboriginal territory and maintains its centuries' old religious and cultural traditions. Since before the arrival of the Europeans in New Mexico, the Pueblo has used waters from the Rio Grande for irrigation, religious ceremonies, recreation, and other purposes. The Pueblo's identity is inextricably linked to the Rio Grande, and its

continued survival depends upon its right to those waters.

Water in the Middle Rio Grande Basin is in short supply. As the population of the American southwest continues to increase, the tension between demand for water and the available supply will become more and more pronounced. To complicate matters further, the Middle Rio Grande is the habitat of two endangered species, the silvery minnow and the southwestern willow flycatcher. The silvery minnow in particular has created enormous tensions in the Basin. *See Rio Grande Silvery Minnow v. Martinez*, No. CIV 99-1320 JP/KBM-ACE (D.N.M. July 19, 2000) (memorandum opinion and order). There is little doubt that the effort to save the fish will stretch the scarce water resources of the Middle Rio Grande Basin even further.

That effort to protect the fish also will magnify the importance of possessing valid water rights in the Middle Rio Grande. The Pueblo of San Felipe, along with the other five Pueblos located along the middle stretch of the river, has a vested right to the most senior water rights in the Basin – an aboriginal water right with a priority date of time immemorial. *State of New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1009-10 (D.N.M. 1985). *See also* Act of Mar. 13, 1928, ch. 219, 45 Stat. 312 (recognizing the Pueblos' prior and paramount water rights for certain purposes). However, because no rights to the water of the Middle Rio Grande have been quantified, an adjudication or settlement of all water rights in the river is inevitable. In that adjudication, in which the United States will be required to protect the Pueblo's right to water in the Middle Rio Grande, it will be absolutely essential that the



Pueblo be able to communicate to the United States its historical knowledge of its water use freely, without any threat of disclosure.

The Zuni Indian Tribe has a homeland in west central New Mexico that was set aside by Executive Order in 1877. Exec. Order of Mar. 16, 1877, 1877 WL 9992. From time immemorial, Zuni religious leaders have departed from the Pueblo of Zuni in New Mexico on a quadrennial pilgrimage to *Kolhu/wala:wa*, or Zuni Heaven, located in present-day Arizona. To the Zuni people, Zuni Heaven is the home of their ancestors, and ceremony associated with those lands is central to the Tribe's religious practice. After making a two-day trek on foot, Zuni religious leaders historically were greeted with a lush riparian habitat, flanked by two mountains of great religious significance to the Tribe. A sacred lake and springs provided water for sustenance and ceremony and sustained a riparian habitat that supported the growth of flora and fauna used in religious practices carried out in the years between the pilgrimages. There is no place more sacred to the Zuni people than *Kolhu/wala:wa*.

While other lands were taken from the Zuni people as the west was developed, the Tribe consistently refused to part with these sacred lands and continued to make regular pilgrimages to the area. In 1984, Congress explicitly recognized the significance of these aboriginal lands, and Zuni Heaven was restored to the Zuni people and made part of the Tribe's reservation for religious and sustenance purposes. Act of Aug. 28, 1984, Pub. L. No. 98-408, 98 Stat. 1533. Those lands are subject to an ongoing general adjudication of the Little Colorado River basin in Arizona instituted by the State. The United States

has filed claims on the Tribe's behalf in the adjudication. Those claims include claims for water for religious purposes as well as water for irrigation and other sustenance activities. To develop the Tribe's claims, the United States has relied almost exclusively on information provided by the Zuni people about their historical and religious practices in the area. Although the Tribe has been willing to share sensitive information about its religious practices as necessary to allow the United States to formulate litigation claims, the Tribe understood that the information would remain confidential and only agreed to provide the information with that understanding in mind. Likewise, within the context of the ongoing litigation, the Tribe and the United States have been negotiating a possible settlement of its claims. In its role as trustee, the United States has been privy to highly sensitive communications about the elements of a settlement essential to the religious and sustenance needs of the Tribe's religious leaders. For both settlement discussions and litigation claims development, the Tribe's communications with the United States have revealed private ceremonial information addressing water and natural resource uses critical to the Tribe's exercise of religion that otherwise would not be available to the United States or any other party.

## SUMMARY OF ARGUMENT

The United States' ownership of Indian trust resources imposes legal obligations upon the federal government found nowhere else in the law. Under this historic trust relationship, the United States government has an affirmative duty to protect the natural resources that it



holds in trust for the benefit of Indian people. This obligation compels the federal government to act in partnership with the Indian tribes with whom it shares a virtually indistinguishable interest in the trust resources it is charged to protect.

When the action of a federal government agency in its regulatory role implicates trust resources, the government's fulfillment of its obligations to Indian tribes under the trust relationship requires it simultaneously to represent the interests of the tribes in the agency action to ensure that the resources held by the United States in trust for the tribes is protected. The duty imposed upon the federal government when acting in this fiduciary role is entirely separate from its duties when acting in its general regulatory role. The government agency discharging the fiduciary role engages in advocacy on behalf of Indian tribes to protect the resources that the United States holds in trust for them. In fulfilling that obligation, it has none of the decision-making responsibilities that characterize the federal government's regulatory role.

Because the purpose for which the federal government obtains information from Indian tribes to assist the government in carrying out its fiduciary obligation to protect the tribes' trust resources in an agency regulatory proceeding is plainly deliberative, that information is not subject to release under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). Indian tribes provide such sensitive information only because the federal government, as trustee of the tribes' natural resources, is obligated to protect those resources for them. Without the information, the federal government would be unable to

protect the resources properly, a result that Indian tribes cannot afford.

## ARGUMENT

### THE TRUST RELATIONSHIP BETWEEN THE UNITED STATES GOVERNMENT AND INDIAN TRIBES PROVIDES THE PROPER CONTEXT FOR RESOLUTION OF THIS DISPUTE

Under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, proper analysis of the documents at issue in the instant case requires a proper recognition and understanding of the context within which the Klamath Basin Tribes provided the documents to the Petitioners. The federal government's trust relationship with Indian tribes provides that context. The trust relationship, which has evolved over the course of almost two centuries and "has long dominated the Government's dealing with Indians," occupies a prominent place in the jurisprudence of this Court. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (citing cases). The trust relationship imposes upon the federal government a fiduciary duty in its dealings with Indians and Indian tribes, particularly with regard to the land, water, and other natural resources that the United States holds in trust for the benefit of Indian people. The duty is a "self-imposed" one that arises out of the Indian tribes' status as "dependent domestic nations" within the territory of the United States. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).



#### A. The United States' Fulfillment Of Its Obligations Under The Trust Relationship Requires That Communications Between It And Indian Tribes Regarding The Protection And Management Of Trust Resources Be Confidential.

The subject matter of the communications between the federal government and Indian tribes *within the confines of the trust relationship* compels the need for confidentiality. This is especially true when those communications concern the protection and management of the trust resources to which the United States holds legal title for the benefit of Indian tribes and individual Indians. The United States' ownership of Indian trust resources imposes legal obligations upon the federal government found nowhere else in the law. So intertwined are the interests of the United States and Indian tribes in those resources that encroachment upon them "is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Heckman v. United States*, 224 U.S. 413, 438 (1912). A duty of "complete representation" thus devolves upon the federal government to protect trust resources regardless of whether an Indian tribe or individual Indian even desires such protection. *Id.* at 444-45; *United States v. Truckee-Carson Irrigation Dist., State of Nev.*, 649 F.2d 1286, 1297-1301 (9th Cir. 1981), *aff'd in part, rev'd in part sub nom. Nevada v. United States*, 463 U.S. 110 (1983). Although the federal government's representation of Indian property interests "does not depend upon the Indians' acquiescence," the outcome effectively binds the tribe whose resources are the subject of the representation. *Heckman*, 224 U.S. at 445. *See also Nevada v. United States*, 463 U.S.

110, 135 (1983); *Arizona v. California*, 460 U.S. 605, 618-19 (1983).

The United States' obligation to the users of federal reclamation project water, such as Respondent's members, does not find its source in any fiduciary duty and is therefore significantly different. The right of such water users is based entirely on the extent of the water right granted them in the water delivery contracts to which they are parties. *Ickes v. Fox*, 300 U.S. 82 (1937); *Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, 849 F. Supp. 717, 731 (E.D. Cal. 1993), *aff'd sub nom. O'Neill v. United States*, 50 F.3d 677 (9th Cir.), *cert. denied*, 516 U.S. 1028 (1995). One leading case aptly describes the contractual nature of the reclamation water user's right:

> A distinction must be recognized between the nature of nonproject water, such as natural-flow water, and project water, and between the manner in which rights to use of such waters are obtained. Right to use of natural-flow water is obtained in accordance with state law. In most western states it is obtained by appropriation putting the water to beneficial use upon lands. Once the rights are obtained they vest, until abandoned, as appurtenances of the land upon which the water has been put to use. Project water, on the other hand, would not exist but for the fact that it has been developed by the United States. It is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix. If such rights are subject to becoming vested beyond the power of the United States to take without just compensation, such vesting can only occur on terms fixed by the United States.



*Israel v. Morton*, 549 F.2d 128, 132-33 (9th Cir. 1977) (footnote omitted). The distinction between the federal government's trust obligation to Indian tribes and its contractual obligation to reclamation water users, and the manner in which those competing obligations inform the relationships of the respective parties with the federal government, lies at the heart of the dispute before the Court.[2]

Petitioner Department of the Interior ("DOI"), consisting of eight component agencies, is charged by Congress with numerous, often conflicting, statutory responsibilities respecting our country's natural resources. Although "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian Tribes," *Nance v. E.P.A.*, 645 F.2d 701, 711 (9th Cir.),

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[2] Congress has recognized and reaffirmed the principle that the federal government's relationship with Indian tribes is unlike no other, and that the communications that take place within the confines of that relationship occupy a special status in the law. For example, 31 U.S.C. § 1352 (Supp. 2000), enacted in 1989 to prohibit the use of funds appropriated by Congress "by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress," *id.* § 1352(a)(1), specifically excludes from the statute's broadly inclusive definitions of "recipient" and "person" only "Indian tribe[s], tribal organization[s], or any other Indian organization eligible to receive Federal contracts, grants, cooperative agreements, or loans." *Id.* §§ 1352(g)(1) & (3).

*cert. denied*, 454 U.S. 1081 (1981) (citing *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)), only one of the DOI's component agencies, Petitioner Bureau of Indian Affairs ("BIA"), has directly been "charged with fulfilling the trust obligations of the United States" to Indians. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968). Because any number of the DOI's myriad responsibilities can arise in connection with a single issue facing the Department, it is not uncommon for the BIA's fulfillment of the trust obligation to be inconsistent with the competing responsibilities of other DOI component agencies (and for the competing responsibilities of the other DOI component agencies to be inconsistent as well with one another). The backdrop against which the Klamath Basin Tribes provided the disputed documents to the BIA illuminates just such a situation.

That backdrop is the DOI's development of the Klamath Project Operations Plan ("KPOP"). Development of the KPOP required the participation of at least three of the DOI's component agencies fulfilling three distinct roles. First, the Bureau of Reclamation ("BOR"), as the component agency responsible for the operation of reclamation projects, *see* 43 U.S.C. § 373a (1986), itself initiated the administrative process aimed at developing the KPOP. As parties with rights to water in the Klamath Basin, both the Klamath Basin Tribes and the Respondent's members participated in that process. Second, because the development of the KPOP raised issues concerning certain threatened or endangered fish species, the participation of the U. S. Fish and Wildlife Service ("FWS"), as the component agency responsible for the implementation of the Endangered Species Act ("ESA"),



*see* 16 U.S.C. §§ 1531-1544 (1985 & Supp. 2000), was required. Its role, of course, was to ensure that the development, and ultimately the implementation, of the KPOP proceed in accord with the requirements of the ESA. Third, because the development of the KPOP implicated the water resources held in trust for the Klamath Basin Tribes by the United States, the participation of the BIA, as the component agency directly responsible for fulfilling the federal government's trust obligation to Indian tribes, also was required. The BIA's only role was to protect the water resources of the Klamath Basin Tribes. Put another way, the extent of the BIA's role in the development of the KPOP was delimited by *the confines of the trust relationship*.

The DOI's varying obligations to Indian tribes and reclamation water users is reflected in the roles of the BOR and BIA in the KPOP administrative process. As the lead agency solely responsible for the development and ultimate adoption and implementation of the KPOP, the BOR was exercising the DOI's general regulatory role. In that role, the BOR's obligation is to treat all parties with rights to water in the Klamath Basin, including the Klamath Basin Tribes (and the BIA on behalf of the Tribes) and Respondent and its members, as coequal participants in the administrative process. In contrast, the BIA, as the component agency "charged with fulfilling the trust obligations of the United States," was specifically exercising the DOI's fiduciary role. That role, which springs out of the trust relationship, is distinct from, but necessarily informs, the regulatory role. *See Joint Bd. of Control of Flathead, Mission and Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1131-32 (9th Cir.

1987), *cert. denied*, 486 U.S. 1007 (1988) (distinguishing the BIA's regulatory role in managing a reservation-based irrigation project "in fairness to all irrigators," Indian and non-Indian alike, from its fiduciary role "in helping the [Confederated Salish and Kootenai] Tribes to protect their prior and paramount fishing water rights"); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1566-67 (10th Cir. 1984) (Seymour, J., dissenting), *dissenting opinion adopted as majority opinion as modified*, 782 F.2d 855 (10th Cir.) (en banc), *cert. denied*, 479 U.S. 970 (1986) (concluding that the Secretary of the Interior "cannot escape his role as trustee by donning the mantle of administrator"). In the fiduciary role, the BIA was acting *within the confines of the trust relationship*. Its sole obligation was to work with and represent the interests of the Klamath Basin Tribes to ensure that the resources held by the United States in trust for the Tribes would be protected in the BOR's development of the KPOP. The BIA played no regulatory role in the KPOP administrative process.

The ability of the federal government to fulfill its fiduciary obligation depends upon the maintenance of a close and confidential working relationship with Indian tribes. Confidentiality has always been the hallmark of the trust relationship. Indeed, from the perspective of *amici*, without assurances that their communications with the federal government, particularly the BIA, *within the confines of the trust relationship* are confidential, the very existence of the trust relationship itself is cast into doubt.



**B. When Analysis Of The Documents At Issue Under The FOIA Is Properly Informed By The Trust Relationship Between The United States Government And Indian Tribes, Those Documents Come Squarely Within The Scope Of FOIA Exemption 5.**

Once it is understood that the Klamath Basin Tribes provided the disputed documents to the BIA *within the confines of the trust relationship*, and that the BIA used the documents in preparing to discharge the federal government's trust obligations to the Tribes in the KPOP administrative process and the Oregon water rights adjudication, that the documents should have been exempt from disclosure under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), seems a foregone conclusion.

Even given that "[t]he mandate of the FOIA calls for broad disclosure of Government records," *C.I.A. v. Sims*, 471 U.S. 159, 166 (1985), the statute was never intended, nor has it ever been interpreted, to require the disclosure of materials in possession of a government agency that falls within one of the nine exemptions listed in section 552(b). *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 793-94 (1984). Congress included the exemptions in the FOIA because it "realized that legitimate governmental and private interests could be harmed by release of certain types of information. . . . " *F.B.I. v. Abramson*, 456 U.S. 615, 621 (1982).

In an official Department of Justice ("DOJ") Memorandum to the heads of executive branch departments and agencies, Attorney General Reno recently declared that "the principle of openness in government" is best served "by achieving the [FOIA]'s primary objective –

maximum responsible disclosure of information – while preserving essential confidentiality." MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES REGARDING THE FREEDOM OF INFORMATION ACT, Office of the Attorney General 1 (Oct. 4, 1993). *Amici* assert that the disclosure under the FOIA of the disputed documents in this case, obtained as they were by the BIA from the Klamath Indian Tribes in furtherance of the federal government's obligation to protect the Tribes' trust resources in the KPOP administrative process and the Oregon water rights adjudication, would cross the line from "maximum responsible disclosure" to grossly irresponsible disclosure because the documents were exchanged *within the confines of the trust relationship*: the documents contained sensitive information that the Tribes provided to the BIA only because the federal government, as trustee of the Tribes' natural resources, was obligated to assert and protect the Tribes' interest in those resources; but for the federal government's obligation, arising out of the trust relationship, the Tribes would have had no reason to provide the disputed documents to the BIA. Moreover, without the information contained in the documents, the BIA would be unable to fulfill properly the federal government's trust obligation to protect the Tribes' resources.

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In short, the BIA's decision not to release the disputed documents, and the DOJ's subsequent defense of that decision, is consistent both with the trust obligation and the policy of the DOJ respecting its defense of FOIA nondisclosure decisions. *See id.* ("[I]t shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to



an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be."). Here, where the Klamath Basin Tribes provided sensitive information to the BIA, at the agency's request, essential to the federal government's protection of the Tribes' trust resources and development of tribal litigation claims, disclosure will most certainly harm the Tribes' and federal government's shared interests.

That the interests of the federal government and Indian tribes in the subject matter of the trust relationship are so closely aligned as to be identical also compels the conclusion that the disputed documents fall within Exemption 5 of the FOIA. "Exemption 5's purpose of protecting the Government's deliberative process is plainly applicable" to information that the BIA obtains from an Indian tribe for use in carrying out the federal government's obligation to protect the property that the United States holds in trust for the tribe's benefit. *United States Dept. of Justice v. Julian*, 486 U.S. 1, 19 n.1 (1988) (Scalia, J., dissenting). *Amici* urge the Court to adopt Justice Scalia's explication of the term "intra-agency memorandum" in Exemption 5 as the proper point of departure for analysis of the applicability of that exemption to documents originating from outside an agency:

> It is textually possible and much more in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other

> than on behalf of another agency – e.g., in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.

*Id.* This interpretation of the scope of Exemption 5, which properly focuses on the agency's use of the information that it receives, recognizes the reality that certain information integral to the performance of a federal government agency's functions is often obtainable only from persons outside of the agency. Under no circumstances is this reality more true than in the BIA's performance of its functions *within the confines of the trust relationship*. There, the interests of the United States and Indian tribes are so intertwined in the land, water, and other natural resources that the United States holds in trust for the benefit of the tribes that the BIA's failure to consult with Indian tribes regarding the protection of those resources would leave the agency unable to fulfill the United States' trust obligations.

## CONCLUSION

The issue in this case is whether the community of interests that the United States and Indian tribes share in the subject matter of the trust relationship – the natural resources that the United States holds in trust for the benefit of Indian people – bestows upon Indian tribes the type of "governmentally conferred capacity" that brings within the ambit of FOIA Exemption 5 information concerning the protection of those trust resources provided



by Indian tribes to the federal government at the government's request. To say that it does not fails to recognize the fundamental distinction between Petitioners' obligations to Indian tribes *within the confines of the trust relationship* and their obligations to all others. The long-term result of such a failure would be to end the open and candid exchange of views and information between Indian tribes and the federal government that is essential to the government's discharge of the trust obligation. For all of the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In The

# Supreme Court of the United States

NOV 13, 2000

UNITED STATES DEPARTMENT
OF THE INTERIOR, et al.,

*Petitioners,*

v.

KLAMATH WATER USERS
PROTECTIVE ASSOCIATION,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF AMICI CURIAE OF THE KLAMATH TRIBES, THE CHIPPEWA CREE TRIBE OF THE ROCKY BOYS' RESERVATION, THE TULE RIVER TRIBE, NATIONAL CONGRESS OF AMERICAN INDIANS, ET AL. IN SUPPORT OF PETITIONERS

(Additional Amici Listed At Conclusion Of Brief)

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## QUESTION PRESENTED

Was the Freedom of Information Act intended to abrogate the federal-tribal trust relationship and eliminate discovery privileges accorded all other litigants by subjecting to disclosure documents exchanged between the United States and Indian tribes about trust resources owned by the United States for the benefit of tribes?

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## INTEREST OF AMICI CURIAE[1]

Amici are 102 federally recognized Indian tribes and two national Indian organizations. All amici tribes must work closely with the United States in managing and protecting many of their natural resources because the tribes do not have sole control over them as they are held in trust by the United States. Particularly, like the Klamath Basin Tribes here, many amici tribes are currently involved in or subject to pending basin-wide, state general stream adjudications. Within the context of those general stream adjudications, some of the tribes are negotiating with the respective states and state authorized water users to attempt to resolve the complex issues surrounding the extent and nature of their water rights. In the course of these negotiations and in preparation for litigation, the United States, primarily through the Bureau of Indian Affairs, has participated and worked with the tribes and has received extensive confidential information including tribal views on the nature, extent and legal grounds in support of their water right claims. The tribes maintain a significant interest in ensuring that the confidential information exchanged between themselves and the federal agency acting as their trustee concerning a broad array of issues involved in the negotiation, litigation and settlement of their water right claims remains out of the reach of adversaries, except

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[1] Counsel for Petitioner and Counsel for Respondent both consent to the filing of the Brief of Amici. Their letters are submitted for filing herewith.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amici Curiae, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

within traditional litigation discovery rules. Moreover, these tribes (as well as states, state authorized water users and the United States) maintain an interest in assuring that the negotiation processes being pursued throughout the West move forward toward successful resolution. Without coordination between the United States and these tribes, which is dependent upon confidential communications, the likelihood of negotiating a resolution to water disputes is substantially diminished and the likelihood of extensive and lengthy litigation is substantially increased.

If communications between beneficiary and fiduciary regarding trust resources are subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), amici tribes will be put to a Hobson's choice regarding management and protection of trust resources upon which they depend for their economic, physical, and spiritual well-being. Tribes will be forced to either (1) refuse to communicate with their trustee the United States about the resources or (2) communicate with the trustee knowing that all such communication will be divulged by the trustee upon request.

This result is contrary to federal law regarding both the trusteeship and exemptions from FOIA articulated by Congress. Such a result is deeply unjust and incorrect because it ignores realities of the trusteeship with which amici must live. Amici urge this Court to decide this case consistently with the federal-tribal trust relationship as it has been described by the Court, as it works in practice, and as it affects the lives and property of Indian people. Amici respectfully urge the Court to protect the confidential communications between trustee and beneficiary



regarding trust resources and to hold that such communications are not disclosable under FOIA.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from the United States' actions in its fiduciary capacity regarding the water rights of Klamath Basin Indian Tribes – the Klamath, Yurok, Hoopa Valley, and Karuk Tribes (Tribes) – in both a general stream adjudication in Oregon and in federal administrative proceedings in the Klamath Basin in Oregon and California. For over a decade, the United States has been working closely with the Tribes to establish and, where appropriate, to quantify the Tribes' right to federally reserved trust water.

Under FOIA, the Respondents – whose interest in water is in direct competition with the Tribes – sought disclosure of confidential communications between the United States and the Tribes regarding this work. The Court of Appeals for the Ninth Circuit held that Respondents are entitled to the requested documents, which leaves Indian tribes with the Hobson's choice of either not communicating with their fiduciary or communicating knowing that sensitive documents will be subject to disclosure.

Either way, any meaningful trusteeship is defeated. The first alternative – refusal of communication – renders the United States incapable of discharging its fiduciary duties. The second alternative – communication with risk of disclosure – guarantees that tribes' interests in proper federal management of their resources will be compromised. Because of the risk of disclosure, communication of information and opinions in this context would be

quite guarded, and the resulting management would not be effective.

The trusteeship, rather than being a protection, becomes an enormous liability and puts tribes in a worse position than any other resource user. Competitors for use of resources would have unfettered access to any documented federal-tribal communications, while there would be no reciprocal access by the tribes or the government to corresponding documentation of the competitors. In essence, other litigants would still have the benefit of discovery privileges but Indian tribes would not. Such a result is not only patently unfair, but it is contrary to both federal-tribal trust law, as well as FOIA law.

Under the well-established federal-tribal trust relationship, the United States holds legal title for Indian resources. As legal owner, the United States often exerts pervasive control over the trust resources, and thus assumes fiduciary duties for those resources – as is certainly the case with the water resources at issue here. Indeed, in the present context of water rights, the trusteeship means that the tribes have no choice in defending their rights but to work closely with the United States, for better or worse. Tribal water resources are generally owned by the United States which must submit tribal water rights for adjudication in state or federal forums as it sees appropriate, with or without the tribes' consent. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). And the tribes will be bound by the outcome no matter how detrimental to their interests. *Nevada v. United States*, 463 U.S. 110 (1983).

The fiduciary relationship requires that the United States communicate with the tribes for whom it owns the resources and assures the tribes' right to confidentiality in such communication. As this Court has consistently



held, tribal rights are not construed to be abrogated by statutes of general applicability, unless Congress has made its intent to do so clear and plain, *see, e.g., United States v. Dion*, 476 U.S. 734 (1987) – something that FOIA just does not do.

Secondly, the trust relationship between the tribes and the federal government about tribal trust resources fits within the functional test of FOIA Exemption 5, which exempts from disclosure documents normally privileged in the discovery context. The documents at issue here clearly meet the requirements of non-discoverable documents and are exempt under discovery privileges. Disclosure here would allow adversaries of Indian tribes to circumvent established rules of discovery accorded all other litigants to gain access to privileged documents. Again, not only is such a result unfair, it contravenes well-established law of this Court and must not be allowed to stand.

## ARGUMENT

### I. DISCLOSURE OF THE DOCUMENTS IN THIS CASE WOULD CONTRAVENE THE TRUSTEESHIP WHICH THE COURT AND CONGRESS HAVE DEFINED, AND WHICH HAS BEEN THE BASIS OF THE UNITED STATES' RELATIONSHIP WITH INDIAN TRIBES FOR THE PAST TWO CENTURIES

#### A. There Is A Clearly Established Federal-Tribal Trust Relationship

##### 1. The Federal Government Has Trust Responsibilities In The Management Of Tribal Trust Resources

From the beginning of the Republic, the trust relationship has permeated and defined the United States'

dealings with Indian tribes. The Court first acknowledged the trust relationship nearly 170 years ago in the "Cherokee cases" when it addressed whether Georgia statutes applied to persons residing on lands secured to the Cherokee Tribe by federal treaties. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), Justice Marshall found that the Cherokee Nation was "a distinct political society," but held that tribes were "more correctly, perhaps, . . . dominated domestic dependent nations," and that "their relation to the United States resembles that of a ward to his guardian." *Id.* at 16-17. In the second Cherokee case, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court again held that the United States had assumed the duty in the Cherokee treaties and relevant federal statutes to manage Indian dealings and protect tribal lands and rights to self-government. *See id.* at 556-59. The Court construed the treaties with the Cherokee Tribe and emphasized that its right "to all the lands within those [territorial boundaries] . . . is not only acknowledged but guaranteed by the United States." *Id.* at 561-62.

Since the Cherokee cases, the Court has developed an exhaustive body of precedent confirming and defining the trust relationship.[2] Subsequent decisions have

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[2] *See, e.g., Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1857); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Heckman v. United States*, 224 U.S. 413 (1912); *Choate v. Trapp*, 224 U.S. 665 (1912); *United States v. Nice*, 241 U.S. 591 (1916); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States v. Payne*, 264 U.S. 446 (1924); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Mason*, 411 U.S. 391 (1973); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Morton v. Mancari*, 417 U.S. 535 (1974); *United States v. Sioux Nation*, 448 U.S. 371 (1980); *Nevada v. United States*, 463 U.S. 110 (1983); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).



established that the federal-tribal trust relationship constitutes both a basis for and a limitation on congressional authority over tribes and tribal interests. *See, e.g., Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977); *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *United States v. Kagama*, 118 U.S. 375 (1886). Moreover, modern case law has determined that, due to the trust relationship, federal statutes should be interpreted liberally as they affect tribes. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Also, the Court has held that an act of Congress will not be construed to extinguish Indian rights unless that intent is clearly and plainly expressed. *See United States v. Dion*, 476 U.S. 734, 738-40 (1987). Finally, the Court has long confirmed the federal government's unique trust responsibility regarding Indian lands and resources. *See United States v. Mitchell*, 463 U.S. 206 (1983).[3]

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[3] For most tribes, governmental control over Indian lands and resources exists because their lands and resources are owned by the United States interest for the benefit of Indian tribes. The United States holds legal title to the resources, while the tribes hold equitable or beneficial title. *See United States v. Algoma Lumber Co.*, 305 U.S. 415, 421 (1939); *Jones v. Meehan*, 175 U.S. 1, 4 (1899). However, even lands which are owned in fee but restricted against alienation by federal law are " 'subject to the legislation of Congress enacted in the exercise of the government's guardianship' over Indian tribes and their property." *United States v. Candelaria*, 271 U.S. 432, 440 (1926) (quoting *United States v. Sandoval*, 231 U.S. 28, 48 (1913)); *United States v. Ramsey*, 271 U.S. 467, 470-71 (1926).

Congress has likewise specifically recognized and sought to carry out federal trust obligations regarding Indian lands and resources. For example, in the Federal Trade and Intercourse Acts, *see, e.g.*, Act of March 30, 1802, § 12, 2 Stat. 139, 143 (codified at 25 U.S.C. § 177), Congress acted to "protect[ ] the rights of Indians to their properties." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 239 (1985). More recently, Congress defined trust responsibilities of the Secretary of the Interior. 25 U.S.C. § 162(d). Congress has also provided for federal representation of tribal trust interests in litigation. 25 U.S.C. § 175. Other federal statutes recognize the government's fiduciary obligation of management and representation regarding numerous specific tribal assets and resources.[4]

The Executive Branch has also recognized and reaffirmed its fiduciary role regarding management of tribal trust assets and resources. Numerous Presidents over the past thirty years have committed to the government-to-government relationship between federal and tribal governments. *See* Executive Order No. 13,175 of November 6, 2000, "Consultation and Coordination with Indian Tribal Government"; Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994); Statement Reaffirming the Government-to-Government Relations with

[4] *See, e.g.*, 25 U.S.C. §§ 162(d)(1)-(7) (concerning trust funds), 323-26 (rights-of-way), 396, 396a-96g (mining leases), 406-07 (timber sales), 415-15d (leases for public, religious, educational, recreational, residential, and business purposes), 2101-08 (mineral development agreements), 3100-20 (forest management); 30 U.S.C. §§ 1701-57 (concerning royalty management systems).



Native American Tribal Governments Between the Federal Government and Indian Tribal Governments, 1991 Pub. Papers 662; Statement on Indian Policy, 1993 Pub. Papers 96; Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564. The Department of the Interior has also specifically recognized its fiduciary obligations regarding management of tribal resources. *See* Dep't of Interior, Departmental Manual, pt. 303, ch. 2; *id.* pt. 512, ch. 2.

### 2. The United States Particularly Bears Comprehensive Trust Duties Regarding Tribal Water Rights

In this case there can be no question that a trust relationship exists between the Tribes and the United States regarding the United States' representation of the Tribes' federally reserved trust water rights. As the Court explained in *United States v. Mitchell*, 463 U.S. 206 (1983):

> [A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."

*Id.* at 225 (citing *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Cl.Ct. 1980)). Here, just as in *Mitchell*, all

the elements of a common law trust are present. The United States (fiduciary) is managing the trust property (federally reserved water rights) of the Indian beneficiary (the Klamath Tribes). *See* Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9,223 (Dep't Interior, 1990) ("Criteria and Procedures") (stating that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians").

Moreover, as Congressional acts mandate, and many of the Court's opinions recognize, the United States' representation of Indian water rights is comprehensive. The federal government may bring suit on behalf of the Indians to determine tribal rights to their water resources. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Arizona v. California*, 373 U.S. 546 (1963). Indeed, with Congress' explicit waiver of sovereign immunity under the McCarran Amendment, 43 U.S.C. § 666, the United States must defend tribal water rights in a state general stream adjudication if sued – as is the case here – even if the tribes are not themselves parties to the adjudication. And, the United States' representation as trustee for the Indians is binding on the Indians. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 n.17 (1983); *see also Heckman v. United States*, 224 U.S. 413 (1912). Thus to assure proper federal representation of tribal trust interests the United States must have the ability to communicate confidentially with the beneficiary tribes.

Indian tribes are bound by the United States' representation of their rights even if the outcome is detrimental to their interests. In *Arizona v. California*, 460 U.S. 605



(1982), the United States was barred from seeking recalculated water rights for Indian lands that it had failed to present in earlier litigation. Even though the tribes were not parties to the prior proceedings, neither the tribes nor the United States were permitted to reopen the litigation in order to vindicate the tribes' rights. *Id.* at 626-27. More recently, in *Nevada v. United States*, 463 U.S. 110 (1983), the government and the tribe were barred by principles of res judicata from seeking additional water rights for the reservation for fishing purposes, where the government had in an earlier proceeding sought only water for irrigation purposes. *Id.* at 134.

The United States' comprehensive management and control of tribal water resources is also evident in practice. Currently, nearly fifty Indian tribes and pueblos, including many amici, are in litigation or negotiation to establish or implement tribal water rights. In each of these cases, the United States participates in its capacity as fiduciary on behalf of the tribes and pueblos. At present, the United States has established 36 federal negotiating teams to work directly with tribes in settling issues of tribal water rights. *See generally* Criteria and Procedures. Specifically, here, the Klamath Basin Tribes have been required to rely, for better or worse, on the federal government to protect their interests in a state water adjudication and in administrative proceedings and the Tribes and the federal government have been working together in these contexts for at least the past thirteen years.

The established, comprehensive fiduciary relationship concerning management of tribal resources, particularly the Tribes' water resources here, must be considered in assessing this case.

### B. The Trust Relationship Requires That The United States Communicate And Communicate Confidentially With Tribes About Tribal Trust Resources

Congressional Acts, Executive Orders, and Departmental memoranda all mandate that the United States consult with Indian tribes on the complex issues regarding the establishment, management, and protection of trust property.[5] Also the fact that the United States holds the resources in trust for the tribes mandates that there be communications between the United States and the tribes about these resources as it would be illogical and patently unfair for one interested party to make decisions about resources without consulting the other.

The fact that the United States holds the resources in trust for the tribes and can legally bind tribes by representing their interests in court necessitates that such communication be open and frank and not accessible by third parties. Ultimately, the trustee cannot be expected to

[5] *See, e.g.*, 2 U.S.C. § 1534(a) (allowing tribal governments to provide meaningful and timely input in the development of regulatory proposals); 25 U.S.C. § 476, (providing for tribes "to prevent the sale, disposition, lease, or encumbrance of tribal lands, or other tribal assets without the consent of the tribe."); Executive Order No. 13,084, 3 C.F.R. 150, *reprinted at* 25 U.S.C.A. § 450, Hist. Notes (West Supp. 2000) (ordering Federal agencies to consult meaningfully with Indian tribes regarding "matters that significantly or uniquely affect their communities" or which "relat[e] to . . . trust resources."); Secretarial Order No. 3215 (Apr. 28, 2000) (allowing for "[c]ommunicat[ion] with beneficial owners regarding the management and administration of Indian trust assets."); Dep't of Interior Manual, pt. 512, § 2.2 (1995) (requiring that the Department provide confidentiality assurances regarding consultations with tribes about tribal trust resources).



administer trust resources in a way that satisfies, for purposes of treaties, Executive Orders, and statutes, indeed, in a way that satisfies even the most rudimentary trusteeship, unless it is able to communicate frankly with the Tribes.[6]

As the Court has consistently recognized, when the federal government has control or supervision over Indian resources, its actions must generally be guided by trust principles. *See United States v. Mitchell*, 463 U.S. 206, 226 & n.31 (1983); *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935). Indeed, common law fiduciary duties remain even when Congress has imposed conflicting representational duties on the federal government. *Arizona v. California*, 460 U.S. 605, 626-27 & n.20 (1983) (noting that tribes might sue the government for breach of fiduciary duties when the government fails to represent tribes adequately). In *Nevada v. United States*, 463 U.S. 110, 143, 145

[6] Other practical considerations also require communication and confidential communication, particularly where the tribe relates valuable information about the trust resources to the federal government. Tribes may have knowledge and expertise rising oftentimes from their time immemorial ownership of the resources that the United States does not have. Also, tribes may have knowledge based on their proximity and familiarity to the resources that the United States does not have. For instance, in the case here, the Klamath Basin Tribes have lived for millennia within the watershed, while their federal trustees are located hundreds of miles away from the water source and the Tribes and is not organized or staffed to properly manage trust resources without communicating with the Tribes themselves.

n.16 (1983), the Court did not discard the fiduciary standards but held that the federal government must respect each of its congressionally imposed obligations and that it does not automatically breach its duties to tribes solely by representing potentially conflicting interests.

Thus common law fiduciary principles must provide a starting point and guide to application of the trusteeship in the instant case. On this count, "[t]he most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty . . . to administer the trust solely in the interest of the beneficiaries." *Pegram v. Herdrich*, 120 S.Ct. 2143, 2152 (2000) (quoting 2A Austin W. Scott & William F. Fratcher on Trusts § 170 at 311 (4th ed. 1987)). *Accord NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); Restatement (Second) of Trusts § 170 (1959); George G. Bogert & George T. Bogert, Law of Trusts and Trustees § 543 at 217-19 (2d rev. ed. 1993). As part of the duty of loyalty, a trustee may not "disclose to a third person information which he has acquired as trustee where he should know that . . . such disclosure would be detrimental to the interest of the beneficiary." Restatement § 170 cmt. s. *Cf. Indian Law Resource Ctr. v. Dep't of the Interior*, 477 F. Supp. 144 (D.D.C. 1979) (relying on the above authority in applying FOIA Exemption 4 to documents that would prejudice tribal interests if disclosed). Indeed, the duty of confidentiality necessarily attaches to a trustee's role as an agent for beneficiaries.[7]

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[7] Trustees such as the United States act as agents based on their duties to represent beneficiaries adequately, honestly, and in good faith, *see Air Line Pilots Ass'n v. O'Neil*, 499 U.S. 65, 75 (1991), and to enforce claims and defend actions that affect the trust corpus, *see generally* Restatement §§ 177, 178; Scott §§ 177, 178.



A second relevant principle is that a trustee must exercise reasonable care and skill to preserve the trust property and make it productive. *See generally* Restatement (Second) of Trusts §§ 174-76, 181; Scott §§ 174-76, 181; Bogert §§ 541, 582. As part of this duty of care, a trustee must "acquaint[ ] himself . . . with the nature and circumstances of the trust property," Restatement § 174 cmt. c, and must "seek[ ] . . . qualified assistance [and] . . . . consider[ ] . . . the advice of specialists or experts where necessary to make informed decisions." Bogert § 541 at 171; *accord Pension Fund v. Cent. Transp. Inc.*, 472 U.S. 559, 572 (1985) ("fundamental common-law duties . . . encompass[ ] 'determin[ing] exactly what property forms the subject-matter of the trust.' ") (quoting Bogert § 583, at 348); *see also* Bogert § 583 at 352. Taken together, the duties of loyalty and care mandate consultation and confidentiality regarding federal management of tribal trust resources.

### C. FOIA Does Not Abrogate Tribal Rights To Confidential Consultations With The United States About Tribal Trust Resources

In this case FOIA must be applied consistently with the government's fiduciary obligations regarding management of the Tribes' trust resources.[8] As the Court has

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[8] In interpreting the applicability of FOIA in this case, the court of appeals cited *Skokomish Indian Tribe v. Federal Energy Regulatory Comm'n*, 121 F.3d 1303, 1308 (9th Cir. 1997), for the proposition that the government must act in the context of governing statutes, and "while it must act in the interests of the tribes, it may not afford them greater rights than they would have under the regulatory scheme." Pet. App. at 10a. While this may be true, this is not the principle that governs in this case. The correct inquiry here is whether FOIA, a statute of general

held time and again, Congress cannot abrogate Indian rights when it passes general laws unless it specifically considers those rights, and affirmatively decides to abrogate them. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1942); *United States v. Payne*, 264 U.S. 446, 448 (1924). This limitation on federal action is especially important where an incorrect interpretation of FOIA would result in the evisceration of a fundamental element of the well-established trust relationship: confidential communications between trustee and beneficiary about trust resources.

In *United States v. Dion*, 476 U.S. 734 (1986), the Court discussed in depth the test to determine whether a statute may be construed as abrogating a tribal right. In that case, the question was whether Congress had statutorily abrogated a tribal member's treaty right to hunt eagles:

> We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. *Cohen* 223; *see also United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941). "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . . " *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690, 99 S.Ct. 3055, 3077, 61 L.Ed.2d 823 (1979). We do not construe statutes as abrogating treaty rights in "a backhanded way," *Menominee Tribe v. United States*, 391 U.S. 404, 412, 88 S.Ct. 1705, 1711; in the absence of explicit statement, " 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' " *Id.*, at 413, 88 S.Ct., at 1711, *quoting Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934). Indian treaty rights are too fundamental to be easily cast aside.

applicability, operates to abrogate the trust relationship between the United States and Indian tribes with respect to these documents.



*Id.* at 738-39 (footnote omitted). In order to find that a statute of general applicability abrogates a tribal right, therefore, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating" those rights. *Id.* at 740.

The United States' role as trustee, mandated by the Court's decisions, Acts of Congress, and Executive orders, and common law trust principles has embedded in it the right to confidential communications. Such confidential communications with Indian tribes must be guarded as jealously as the treaty rights at issue in *Dion* were guarded. These communications, like the hunting right in *Dion*, "[are] too fundamental to be easily cast aside." *Dion*, 476 U.S. at 739.

This Court has not limited application of Indian rights to specific treaties even though the fundamental principles outlining those rights may have originated in a treaty case. *See* Felix S. Cohen, Handbook of Federal Indian Law, 224 (1982 ed.) ("in implementing the federal-tribal relationship Congress has not drawn distinctions between treaty tribes and nontreaty tribes."). In fact, the Court has not limited to treaties the canon of construction that Indian treaties are entitled to liberal construction. *See Jones v. Meehan*, 175 U.S. 1 (1899). As long ago as *Choate v. Trapp*, 224 U.S. 665 (1912), the Court specifically held that this canon of construction – given the "universality of th[e] rule" – also applies to the interpretation of ambiguous statutes. *Id.* at 675; *see also* Cohen at 224 ("Statutes,

agreements, and executive orders dealing with Indian affairs have been construed liberally in favor of establishing Indian rights."). Likewise, the Court firmly has rejected the notion that treaty reservations are to be distinguished from Executive Order or statutory reservations. Rather, the rights of Indian tribes because of reservation status vest and are protected no matter how the reservation was created. *See Dion*, 476 U.S. at 745 n.8. Finally, while this Court first relied on treaty language in holding in that an Indian's income was not subject to state taxation where that Indian both lived and worked on her reservation, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 165-66 (1973), that rule has never been limited to specific treaty situations or "treaty tribes." Rather, the rule against state taxation of Indians within Indian country is a *per se* rule applying to all Indians within all Indian country. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1985); *County of Yakima v. Yakima Nation*, 502 U.S. 251, 267 (1992).

Accordingly, unless Congress specifically considered the trust relationship and its essential component of confidentiality and determined to abrogate them, FOIA cannot be read here to diminish the trust relationship. There is no indication whatsoever that in enacting FOIA Congress considered, much less expressed an intent to eliminate the confidentiality of communications between trustee and beneficiary or adversely affect the trust relationship in any way. Even if it could be inferred that Congress so intended, it is clear that such an implication is insufficient grounds for applying FOIA in a way that sabotages the relationship. Because Congress did not explicitly intend for FOIA to abrogate the trust relationship or any element of it, a proper reading of the statute must leave the relationship intact.



## II. DISCLOSURE OF THE DOCUMENTS IN THIS CASE CONTRAVENES EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT AND MAKES INDIAN TRIBES THE ONLY PARTIES IN THE UNITED STATES UNABLE TO RELY ON DISCOVERY PRIVILEGES

### A. Congress Intended To Ensure Open And Frank Government Discussions By Protecting Executive Deliberations, Attorney-Client Communications And Work Product Under FOIA Exemption 5

Because Congress recognized " 'that legitimate governmental and private interests could be harmed by release of certain types of information,' " *United States v. Julian*, 486 U.S. 1, 9 (1988) (quoting *FBI v. Abramson*, 456 U.S. 615, 621 (1982)), Congress created nine exemptions under FOIA. Exemption 5, the specific exemption at issue in this case, protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). As this Court has made clear, Congress enacted Exemption 5 to "ensure frank and open discussion and hence efficient governmental operations," *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984), concerning "legal or policy matters." *FTC v. Grolier Inc.*, 462 U.S. 19, 23 (1983). *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). On this point, the legislative history indicates that:

> [I]t would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that

> efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl."

S. Rep. No. 89-813 at 9 (1965). *Accord* H.R. Rep. No. 89-1497 at 10 (1966).

In order to achieve the goal of frank and open government communications, Exemption 5 specifically protects documents that would "normally [be] privileged in the discovery context." *Julian*, 486 U.S. at 12. Among other privileges, the Court has applied Exemption 5 to protect: "(i) the generally recognized privilege for confidential intra-agency advisory opinions, disclosure of which would be injurious to the consultative functions of the government (sometimes referred to as 'executive [or deliberative process] privilege'), and (ii) the attorney-client and attorney work-product privileges generally available to all litigants." *Sears*, 421 U.S. at 149.

Accordingly, for documents to qualify for protection under Exemption 5, they must both constitute "inter-agency or intra-agency memorandums or letters" and be privileged. *See Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 352 (1979). The documents at issue here meet both of these criteria and as a result are not disclosable.

### B. Communications Between The Federal Government And Tribes Regarding Tribal Trust Resources Fall Within Exemption 5

#### 1. Regarding The Management Of Tribal Trust Assets, Federal-Tribal Communications Meet The Functional Test Of Exemption 5

Tribes of course are not "agencies" within a strict reading of Exemption 5's "inter-agency or intra-agency"



language. However, Congress did not intend the exemption to be construed so strictly as to place form over substance. *See* S. Rep. No. 89-813 at 9 (cautioning that exemption should be viewed only "as narrowly as consistent with efficient government operation."). Reading Exemption 5 accordingly, amici submit that the federal-tribal trust relationship and the specific role the Tribes' played in generating the communications here at issue bring these documents squarely within the ambit of Exemption 5.

The courts of appeals have developed what is now known as the "functional test" under FOIA Exemption 5 to deal with instances where federal agencies' have "encountered problems outside their ken" and turned to nonagency experts. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987). *Accord Texas v. Interstate Commerce Comm'n*, 889 F.2d 59, 61 (5th Cir. 1989); *Formaldehyde Inst. v. Dep't of Health & Human Serv.*, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989) (developing and applying functional test). Notably, this test and its "common sense interpretation of 'intra-agency[,]' . . . accommodate the realities of the typical agency deliberative process [and] has been consistently applied by the courts." *Ryan v. Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980).

Under the functional test, the source of the communications at issue is not determinative. Instead, the functional test inquires as to the purpose served by those communications, within the context of the administrative process that created them, to determine whether they served a lawfully privileged government function. *See generally Formaldehyde Inst.*, 889 F.2d 1122-23. Accordingly,

> [w]hether the author [of the subject communications] is a regular agency employee or a temporary consultant is irrelevant; *the pertinent element is the role, if any, that the document plays in the*

> *process of agency deliberations*. If the information communicated is deliberative in character it is privileged from disclosure, notwithstanding its creation by an outsider.

*CNA Financial Corp.*, 830 F.2d at 1161-62 (emphasis added).

The functional test rises fully and faithfully from Congress' purposes in enacting Exemption 5 of allowing frank and open discussions in government decisionmaking and recognizes Congress' practical intent that the terms "inter-agency" and "intra-agency" not be read as "rigidly exclusive." *Ryan*, 617 F.2d at 790; *accord CNA Financial Corp.*, 830 F.2d at 1161-62. While it intended courts to read all FOIA exemptions narrowly, Congress specifically noted that Exemption 5 be read only "as narrowly as consistent with efficient government operation." S. Rep. No. 89-813 at 9. *Accord Grolier*, 462 U.S. at 23. Above all, Congress intended its exemptions to craft "workable standards," not absolute requirements that would place form over substance. S. Rep. No. 89-813 at 5.

While this Court has not yet formally embraced it, the functional test is consistent with the Court's prior decisions which have recognized that "the public's access to internal memoranda [should] be governed by the same flexible, common-sense approach that has long governed private parties' discovery of such documents involved in litigation with government agencies." *EPA v. Mink*, 410 U.S. 73, 91 (1973). As the Court noted in *Sears*, "the function of the documents in issue in the context of the administrative process which generated them" is "crucial" to determining whether Exemption 5 applies. 421 U.S. at 136. *See also CNA Financial Corp.*, 830 F.2d at 1161 ("[T]he pertinent element is the role, if any, that document plays in the process of agency deliberations."). Indeed, instead of adhering to a strict definition of the



statutory term "intra-agency memorandum," Justices Scalia and O'Connor and White have recognized that it is not only "permissible" but

> desirable . . . and much more in accord with the purpose of [Exemption 5] to regard as an intra-agency memorandum one that has been received by an agency to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency. . . .

*Julian*, 486 U.S. at 18 n.1 (Scalia, J., dissenting).

Two of the most analogous factual examples of application of the functional test to the situation here are found in *Public Citizen, Inc. v. Dep't of Justice*, 111 F.3d 168 (D.C. Cir. 1997), and *Ryan*. In *Public Citizen*, the court addressed whether Exemption 5 shielded documents shared between former Presidents and in *Ryan*, it addressed whether Exemption 5 shielded documents prepared by United States Senators. In both cases, the court held that the documents created by these non-agency actors were exempt.

Clearly, neither Senators nor ex-Presidents are agency employees. Nevertheless, the relationships that these individuals have with federal agencies requires that the agencies communicate confidentially with them about governmental functions. As the court in *Public Citizen* expressly noted, "the former President in this context can hardly be viewed as an ordinary private citizen. . . . 'The privilege is not for the benefit of the President as an individual, but for the benefit of the Republic.' " 111 F.3d at 170 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 448-49 (1977)). Protecting communications generated by such persons outside of federal agencies acknowledges their unique legal relationships with those

agencies and comports with Congress' intent to protect governmental functioning vis-à-vis those persons.

In the same way, federal agencies have a unique relationship with Indian tribes that requires open and frank communications with tribes to enable the agencies to properly carry out their governmental responsibilities toward tribes, for, as explained above, the relationship between the United States and Indian tribes is a trust relationship. Because of the function of documents exchanged in the exercise of the government's trust duty, the documents in this case meet the functional test for "inter-agency or intra-agency" documents.

**2. The Documents At Issue Here Concern Executive Deliberations And Attorney-Client Communications And Are Thus The Kind Of Documents Normally Protected By Exemption 5**

The Court has applied Exemption 5 to protect the executive deliberative process privilege, the attorney-client privilege, and the work product privilege. *See Sears*, 421 U.S. at 150-54. The executive privilege protects federal agencies' predecisional reports, working papers, and communications, *Merrill*, 443 U.S. at 353, as well as "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' " *Sears*, 421 U.S. at 150 (citation omitted). This privilege thus serves to "protect[ ] the 'decision making processes of government agencies" and "to prevent injury to the quality of agency decisions." *Id.* at 151. *Accord* S. Rep. 89-813 at 9 ("[I]t would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny."); H.R.



Rep. 89-1497 at 9. In turn, the attorney-client privilege protects "the giving of information to the lawyer to enable him to give sound and informed advice[,]" and extends to communications with non-management personnel "who . . . possess the information needed by the . . . lawyers." *Upjohn Co. v. United States*, 449 U.S. 383, 390, 391 (1981). Finally, because "[p]roper presentation of a client's case demands that [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference[,]" the attorney work-product privilege provides that "written materials obtained by . . . counsel with an eye toward litigation are necessarily free from discovery in all cases." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Indeed, work product is protected under FOIA Exemption 5 "without regard to the status of the litigation for which it was prepared." *Grolier*, 462 U.S. at 28.

The documents here clearly qualify for such privileges. First, the documents fall within the executive deliberative process privilege because disclosure would be harmful to proper federal management of tribal resources. As explained in Section I, *supra*, numerous legal and practical considerations require federal-tribal consultations regarding management of tribal resources. These consultations are necessary for properly informed and considered federal deliberations and decisions regarding tribal resource management. Failure to protect the confidentiality of these consultations would have a chilling effect on these frank discussions and lead to wasted federal efforts to substitute for tribal knowledge and insights and/or uninformed federal deliberations and decisionmaking. Because both of these possible consequences would be *"detriment[al to] the decisionmaking*

*process*[,]" *Id.* at 151 (citation omitted and emphasis in original), these consultations are protected under the deliberative process privilege of FOIA Exemption 5.

In addition, many federal-tribal resource consultations qualify for protection under the attorney privileges protected by FOIA Exemption 5. Resource management issues often arise in the context of competing claims to those resources, and litigation results. As explained above, both common law trust principles and applicable statutes and precedents require federal legal representation for Indian resource interests. In these situations where litigation is possible or ongoing, the federal government acts as the attorney for tribes and federal-tribal consultations necessarily constitute either attorney-client communications or attorney work-product.

### C. Neither The Tribes' Interest In The Subject Matter Of The Department's Deliberations Nor The Possibility Of Federal-Tribal Disputes Undermines Application Of FOIA Exemption 5

In their Brief in Opposition, Respondents raised two points which they contend inform the analysis here. First, Respondents argue that "Tribes are non-neutral, interested parties." Br. in Opp. at 12-13. Second, Respondents state that the "Tribes, moreover, are past, present, and potential future adversaries of Interior with respect to the decisions being made in KPOP and the adjudication. *See Id.* In part based on these arguments, the court of appeals held that the documents here were subject to disclosure. However, as shown below, these points do not carry the weight both Respondents and the court of appeals would place on them.



#### 1. Tribal Interest In The Subject Of The Communications Does Not Render Their Communications Ex Parte

Indian tribes have an interest in their own trust assets. The court of appeals below raised the concern that such an interest made communications between the United States and the Tribes in some way similar to ex parte communications. Pet. App. at 10a. This concern is misplaced, however, particularly where the United States is a litigant on the Tribes' behalf in the state water rights adjudication, and even where the United States acts as an administrative decision maker in the KPOP process. In both the adjudication and the administrative proceedings, the government is fulfilling the same role as it communicates with the Tribes: it is acting to gather information and develop legal theories so that it may properly protect its own water – the water it holds in trust for the Tribes. In the adjudication process, the United States is communicating with the Tribes so that it may internally determine the extent, quantity and use of its own federal water rights held in trust for the Klamath Tribes and so that it can advance and defend those rights in the adjudication. Because the state court adjudicates these claims, there is certainly nothing ex parte to consider. In case of the general stream adjudication, the United States is acting solely as the Tribes' representative and co-party.

On the KPOP front, the United States is communicating with the Tribes for the same reasons it is on the adjudication front. The Bureau of Indian Affairs is communicating so as to internally determine the extent, quantity and use of its own federal water rights held in trust for the Klamath Tribes so that it can advance and protect those rights in the administrative process. The fact that the Bureau of Reclamation acts as ultimate decisionmaker

and must consider other interests, such as those of the Respondents, does not diminish the government's responsibility as fiduciary for the trust resources. While both Bureaus are within the Department of the Interior, as the Court made clear in *Nevada*, it is the obligation of the federal government "to carry water on two shoulders." 463 U.S. at 128. In this case, the government's obligation requires it to act as both owner (and hence trust representative) as well as conducting KPOP operations consistent with the Tribes' federally reserved water rights at issue.[9] Ex parte concerns are thus also misplaced here.

### 2. The Tribes Are Not Adversaries Of The Federal Government In This Case

Respondent has cited *County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981), as precedent for the proposition that the documents at issue here do not fit within the functional test. *See* Br. in Opp. at 12-13. Although *County of Madison* did indeed address the applicability of Exemption 5 in an Indian law context, it was a context radically different from the one at issue here. There, the tribes were actually litigating against the United States and thus the court expressly found that the

[9] *Nevada* described the salient distinction between such federal Indian trust water rights and the water rights associated with a federal irrigation project. As to the latter, *Nevada* emphasized that, under Reclamation law, the water was to be used not by the government but by the land owners, because ownership of the rights would not remain with the government but would pass to the land owners. In contrast, the federal Indian trust water rights remain permanently federal reserved water rights. Recognition of this "in-house" characteristic of federal Indian water rights negates any issue with tribal "interest" to the case here. *Nevada*, 463 U.S. at 126.



tribes were "adversaries, not coopted colleagues" of the government. The court suggested that only nonadversarial communications with nonagency personnel are protected by Exemption 5 and that communications arising from an adverse relationship are not protected. As no adversarial relationship between the Tribes and the federal government exists in this case, much less any indication that any of the communications arose from an adversarial relationship, *County of Madison* is irrelevant. *See Public Citizen*, 111 F.3d at 171 ("[T]he potential for an adversary relationship is not enough to negate one of consultation." Even a past adversarial relationship does not, of itself, destroy a presently consultative relationship.)

## D. Failure To Apply FOIA Exemption 5 Here Would Sanction Use Of FOIA As A Substitute For Discovery In Contravention Of This Court's Warnings

By enacting FOIA, Congress did not intend to allow parties to subvert the Court's carefully crafted rules governing discovery. "[A] court must be mindful of this Court's observations that the FOIA was not intended to supplement or displace rules of discovery." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236-39 (1978); *Weber*, 465 U.S. at 801-02). The Court repeatedly has admonished litigants that FOIA is not available as a means to expand discovery beyond the scope available under the federal rules governing discovery. *See Julian*, 486 U.S. at 12 (quoting *Sears*, 421 U.S. at 149, and H.R. Rep. No. 89-1497 at 10). To allow litigants to obtain information under FOIA that is "normally privileged would

create an anomaly that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of FOIA." *Weber*, 465 U.S. at 801-02 (citing *Baldridge v. Shapiro*, 455 U.S. 345, 360 n.14 (1982); *Sears*, 421 U.S. at 143 n.10; *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

Applying this precedent, the Court should reject the attempt to use FOIA as a tool to circumvent long-established discovery procedures. Because the relevant documents here are privileged from disclosure under the rules of discovery, they should not be subject to disclosure under FOIA. Failure to protect federal-tribal consultations made within the context of governmentally mandated and judicially recognized duties would impermissibly circumvent application of standard discovery privileges to tribes. Without preserving confidentiality here, the United States' ability to discharge its fiduciary obligations to tribes would be seriously impaired and tribes would be placed in a worse position than any other litigant solely because the government acts as their representative. Such a result is contrary to both law and reason.

## CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed.

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In The

# Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,

*Petitioners,*

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF AMICUS CURIAE CITY OF TACOMA, WASHINGTON IN SUPPORT OF RESPONDENT

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## I. QUESTION PRESENTED

Should this Court adopt a new trustee-beneficiary privilege for the purpose of protecting communications between Indian tribes and the United States?

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## II. INTEREST OF AMICUS CURIAE

The City of Tacoma, population 185,000, is the third largest city in the State of Washington. Founded in 1884, the City has played an integral role in the development of the Pacific Northwest.

In the early 1920s, as part of the regional effort to spur settlement and development, Tacoma applied for and obtained a license to construct the Cushman Hydro-Electric Project on the North Fork of the Skokomish River. The Skokomish Indian Tribe claims that the Cushman Project has adversely impacted its treaty fishing rights along the Skokomish River and led to sedimentation and flooding problems.

Pursuant to the Federal Power Act, the Cushman Project was subject to relicensing in 1974. In 1975, the Skokomish Tribe intervened in the relicensing proceedings. Since that time, the relicensing has been the subject of litigation involving Tacoma, the Skokomish Indian Tribe, and numerous environmental groups and state and federal agencies. FERC Cause No. 95-70884. During the course of litigation the Tribe has accused FERC of violating a fiduciary responsibility to the Tribe by not acting in the Tribe's interest. *See, e.g., Skokomish Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997).

In November 1999, the Skokomish Tribe filed a lawsuit against Tacoma that seeks $5.8 billion in damages allegedly caused by construction and operation of the Cushman Project. The alleged period of damages spans from the initial construction in the 1920's to the present and into the indefinite future. The Tribe included the United States as a codefendant and alleged, among other

things, that the United States had breached its fiduciary duty to the Tribe by refusing to bring a lawsuit against Tacoma for damages on behalf of the Tribe. The United States was dismissed from the lawsuit on May 26, 2000.

During the course of relicensing litigation and the more recent litigation concerning alleged damages, Tacoma submitted a number of Freedom of Information Act requests to the Department of Interior and its constituent agencies. Tacoma's principal request sought all documents reflecting, referring or relating to the claims of the Skokomish Indian Tribe under the Indian Claims Limitation Act ("ICLA"). That Act required tribes wishing to pursue pre-1966 claims for damages against a private entity, such as Tacoma, to register that claim with the Bureau of Indian Affairs. 28 U.S.C. § 2415(a); *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1084 (2d Cir. 1982). Failure of a tribe to file that claim by the statutory deadline would result in a waiver of the claim. On March 31, 1983, the United States published a notice listing such claims filed by the Skokomish Tribe and its members, 48 Fed. Reg. 13698, 13912 (Mar. 31, 1983), five of which might affect Tacoma's interests. Tacoma also sought documents relevant to the damage claims asserted by the Tribe, including information about conservation, fisheries, proposed mitigation, sedimentation issues and flooding. After experiencing frustration in the FOIA process, Tacoma recently served employees at the Department of Interior with subpoenas requesting production of the same documents.

To date, no documents relating to claims filed by the Skokomish Tribe pursuant to ICLA or about the Tribe's alleged damages have been produced by the Department.



Although Tacoma and the Department are attempting to resolve their differences, the U.S. Attorney has advised Tacoma that the Department may not produce documents similar to those that are the subject of this litigation under the so-called doctrine of "non-acquiescence."

Tacoma seeks to relicense the Cushman Project and to defend itself against the allegations made by the Skokomish tribe. These efforts may be adversely impacted if this Court creates a new trustee-beneficiary privilege that prevents the disclosure of communications between tribes and the United States.

## III. SUMMARY OF THE ARGUMENT

Exemption 5 of the Freedom of Information Act protects information not available by law in litigation. Thus, Exemption 5 protects material produced through privileged communications. Communications between a tribe and the United States, however, have never been considered privileged. While there is a trust relationship between the tribes and the United States, that relationship, in and of itself, does not create a privilege from disclosure under the ordinary rules of discovery.

The Petitioner and various *amici* would have this Court paint with a broad brush – so long as the communication between the United States and the Indian tribes is *"within the confines of a trust relationship,"* then the communication is privileged. *See, e.g.*, Brief Amicus Curiae of the Campo Band of Mission Indians *et al.*, at 11, 15, 16, 17, 18, 20 (emphasis in original). Presumably, this approach would implicate literally all communications between the tribes and the United States.

The Petitioner's position ignores general trustee-beneficiary law, which does not recognize a trustee-beneficiary privilege. Indeed, every court throughout the country that has considered the question has ruled that privileges should be narrowly construed and should not be added upon nor enlarged except in exceptional circumstances. The Petitioner's approach also pays short shrift to the sizable body of federal law that distinguishes between the government's general, "bare trust" responsibilities and its special trust responsibilities. Only the latter establish a legally enforceable fiduciary relationship. Even a special trust responsibility, however, does not give rise to privileged communications.

If this court chooses to expand the trustee-beneficiary privilege, access to important information that should be available to all would be curtailed. Restricting access to this information could adversely affect public resources, including fishing rights and water rights. Communications between the United States and the tribes should not be subject to any different standards than the standards to which all other parties are subject. In this respect, the tribes are entitled to no better, and no worse, treatment than the rest of us.

## IV. ARGUMENT

### (A) Communications Between a Trustee and Beneficiary are Not Privileged.

Exemption 5 of the Freedom of Information Act ("FOIA") shields from disclosure "intra-agency or intra-agency memorandums or letters which would not be



available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

Petitioner and the tribes obscure the true nature of the relationship between the United States and the Klamath Tribe. A tribe is clearly not a federal agency; it is a discreet, quasi-sovereign entity. Nor is a tribe an agency's "consultant" under the generally accepted definition of that term. "Consultant," as defined by the Encarta Dictionary, is "an expert who charges a fee for providing advice or services in a particular field." *Encarta World English Dictionary* (visited Dec. 8, 2000) <http://dictionary.msn.com>. Although a tribe may be knowledgeable about the information it provides to an agency, it provides this information cost-free in furtherance of its own interests. Rather, a tribe communicates with the United States as the beneficiary of a trust relationship with the United States. Thus, the Petitioner essentially asserts that the documents provided to the Department of the Interior by the Klamath Tribes are privileged because they were exchanged in the context of that trust relationship. All other arguments are simply distractions.

Rule 501 of the Federal Rules of Evidence authorizes the Court to define new privileges by interpreting "common law principles . . . in the light of reason and experience." *See, e.g., Jaffee v. Redmond*, 518 U.S. 1 (1996) (federal common law recognizes psychotherapist-patient privilege); *Trammel v. United States*, 445 U.S. 40 (1980) (modifying privilege against adverse spousal testimony). As this Court has made clear, evidentiary privileges should not be created lightly, "[i]nasmuch as '[t]estimonial exclusionary rules and privileges contravene the fundamental

principle that the public . . . has a right to every man's evidence.' " *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (*quoting Trammel v. United States*, 445 U.S. 40, 50, (1980) (citation omitted)).

When evaluating a claim of privilege this Court " 'start[s] with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.' " *United States v. Bryan*, 339 U.S. 323, 331 (1950) (*quoting* 8 J. Wigmore, Evidence § 2192, p. 64 (3d ed. 1940)). Thus, this Court should greet any attempt to fashion a privilege lacking in historical or statutory basis with considerable reluctance. *University of Pennsylvania*, 493 U.S. at 195. The party seeking an exception from disclosure bears the burden of establishing the existence of a privilege and its applicability to a particular case. *See, e.g., United States v. International Brotherhood of Teamsters*, 119 F.3d 210, 214 (2d Cir.1997). The burden is a heavy one, since privileges are neither "lightly created nor expansively construed." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

What is entirely lacking in the Petitioner's brief, or any of the various *amici* briefs submitted on behalf of the Petitioner, is *any* discussion in either federal law or common law where *any* court has determined that communications between a trustee and a beneficiary are



privileged. In fact, no such decision exists. Thus, Petitioner asserts the trustee-beneficiary privilege without any precedence whatsoever.[1]

Although the Restatement (Second) of Trusts, Section 170, Comment S, provides that a trustee is under a duty not to disclose information, this directive is a far cry from a privilege from disclosure under the rules of discovery. Indeed, there are many "confidential" communications that are not "privileged" communications. These include communications between a client and an accountant,[2] a parent and a child,[3] an employer and an employee,[4] a

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[1] In contrast, the psychotherapist-patient privilege recently recognized by this Court in *Jaffe v. Redmond* was recognized in some form by all fifty states and the District of Columbia. 518 U.S. at 18.

[2] *United States v. Arthur Young & Co.*, 465 U.S. 805, 816-17 (1984); *Couch v. United States*, 409 U.S. 322, 335 (1973); *United States v. Bein*, 728 F.2d 107, 112-13 (2d Cir.), *cert. denied sub. nom. DeAngelis v. United States*, 469 U.S. 837 (1984). Congress created an extremely limited accountant-client privilege in the Internal Revenue Service Restructuring and Reform Act of 1998. 26 U.S.C. § 7525(a).

[3] *In re Grand Jury*, 103 F.3d 1140, 1143, 1146-1148, 1157 (3d Cir.), *cert. denied sub nom. Roe v. United States*, 520 U.S. 1253 (1997); *In re Erato*, 2 F.3d 11, 16 (2d Cir.1993); *In the Matter of a Grand Jury Subpoena*, 722 N.E. 2d 450 (Mass. 2000); *State v. Maxon*, 756 P.2d 1297, 1303 (Wash. 1988).

[4] *United States v. Keeney*, 111 F.Supp. 233 (D.D.C.1953); *rev'd on other grounds*, 218 F.2d 843 (D.C.Cir.1954); *Smith v. B & O R. Co.*, 473 F.Supp. 572, 585-86 (D.Md. 1979).

banker and a customer,[5] and an insurance agent and an insured.[6] All of these relationships may include some "confidential" communication that generally should not be made available to others. Nevertheless, when those relationships are subject to the scrutiny of discovery rules, those communications are no longer cloaked in secrecy and are not privileged.

In short, there is no precedent, either in common law or statute, for creating a trustee-beneficiary privilege. As discussed above, numerous other relationships where confidentiality is an equal or greater concern have been denied a special privilege. Accordingly, there is no basis for creating a "distinctly exceptional" exemption for the trust relationship.

**(B) The federal trust responsibility to tribes does not compel heightened protection of communications.**

The Petitioner and tribes submitting *amicus* briefs on behalf of the Petitioner frame the federal trust responsibility as a holistic, monolithic duty that exists in every transaction between a tribe and the United States. This

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[5] *United States v. Prevatt*, 526 F.2d 400, 403 (5th Cir. 1976); *Sneirson v. Chemical Bank*, 108 F.R.D. 159, 162 (D.Del.1985); *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21, 23 (S.D.N.Y.1971).

[6] *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C.Cir.1993); *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir.1992); *Aiena v. Olsen*, 194 F.R.D. 134, 136 (S.D.N.Y. 2000).



portrayal is a gross mischaracterization of this judicially created trust relationship.

The trust relationship between the United States and Indian tribes is normally no more than a "bare trust" that creates no legally enforceable duty. *United States v. Mitchell*, 445 U.S. 535, 542 (1980) (*Mitchell I*). In some limited circumstances, none of which occur in this case, the United States does owe a special duty to the tribes that is legally enforceable. *United States v. Mitchell*, 463 U.S. 206, 224-25 (1983) (*Mitchell II*). Regardless, in no circumstance has any tribe successfully asserted a privilege from disclosing information based on either a general or special trust relationship.

The nature and scope of the federal trust responsibility is entirely dependent on the context of the relationship between the tribe and the United States. Thus, while it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987), it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations. *Mitchell II*, 463 U.S. at 224-25; *Mitchell I*, 445 U.S. at 542. "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." *North Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C.Cir.1980).

The variability in the trust relationship is clearly demonstrated by this Court's analysis in *Mitchell I*, 445

U.S. at 542, and *Mitchell II*, 463 U.S. at 224-25. In *Mitchell I*, this Court examined the General Allotment Act's requirement that the United States "hold the land . . . in trust for the sole use and benefit of the" allottee. Despite the invocation of a trust relationship, this Court held that the Act did not create any fiduciary obligation to manage timber resources appropriately on these allotments, since the language and legislative history of the Act did "not unambiguously provide that the United States has undertaken full fiduciary responsibility as to the management of allotted lands. . . . " 445 U.S at 542, 546. Conversely, in *Mitchell II* this Court found that, in contrast to the "bare trust" created by the General Allotment Act, the United States' extensive statutory and regulatory control over timber resources and management on tribal lands created a heightened responsibility akin to that of a trustee that was enforceable at law. 463 U.S at 224. Nevertheless, the Court never discussed nor adopted a trustee-beneficiary privilege arising out of that special trust relationship. Nor has any case since.

Notably, Courts have regularly rejected attempts by Indian tribes to expand the United States' general, "bare trust" responsibility in the absence of a statutory and regulatory scheme creating a heightened fiduciary relationship. Frequently, this occurs when tribes attempt to compel the United States to grant them a special status when enforcing general statutes and regulations. In *Morongo Band of Indians v. Federal Aviation Admin.*, 161 F.3d 569 (9th Cir. 1998), for instance, the Ninth Circuit rejected the Morongo Band's argument that the Federal Aviation Administration, as trustee, was bound to act in the interest of the tribe:



> . . . [A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.

161 F.3d at 574. The court reached the same conclusion in *Skokomish Tribe v. Federal Energy Regulatory Comm'n*, 121 F.3d 1033 (9th Cir. 1997), holding that Indian tribes were not entitled to "greater rights that they would otherwise have under the [Federal Power Act] and its implementing regulations." *Id.* at 1308-09.[7] Similarly, the federal trust responsibility does not require the United States to pursue litigation on behalf of a tribe, even in disputes

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[7] *See also United States v. Shoshone-Bannock Tribes*, 229 F.3d 1161, 2000 WL 915398 (9th Cir. July 7, 2000) (the Resource Conservation and Recovery Act does not create a fiduciary duty to enforce the Act on fee land within a reservation); *North Slope Borough v. Andrus*, 642 F.2d 589, 611 (D.C.Cir.1980) (the Endangered Species Act and National Environmental Policy Act did not create a heightened fiduciary responsibility to Native Americans); *Havasupai Tribe v. United States*, 752 F.Supp. 1471, 1487-89 (D.Ariz 1990) (Neither the Treaty of Guadalupe Hidalgo, the American Indian Religious Freedom Act, the Grand Canyon National Park Enlargement Act, nor the government's general course of dealing with the tribe created a special fiduciary duty to the tribe), *aff'd sub. nom. Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991), *cert. denied sub. nom. Havasupai Tribe v. United States*, 503 U.S. 959 (1992); *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct.Cl.1980) (the existence of the special relationship obligating the United States to educate Indians depends on the proper interpretation of the terms of some authorizing document).

involving natural resources held in trust for a tribe. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1483 (D.C. Cir. 1995); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F.2d 1095, 1097 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *White Mountain Apache Tribe v. United States*, 46 Fed.Cl. 20 (Fed.Cl. 1999); *see also Lincoln v. Vigil*, 508 U.S. 182 (1993) (The trust relationship did not limit the Indian Health Service discretion apply lump-sum appropriations as it saw fit.)

The Petitioner and *amici* tribes can neither demonstrate an historic privilege nor present any compelling new circumstances that require the creation of a new privilege that cloaks communications between tribes and the United States in secrecy. Nothing in FOIA or its implementing regulations requires special protection of communications from Indian tribes. Contrary to the *amici* tribes' arguments, none of the executive orders, regulations and agreements governing tribal communications with the United States even attempt to change law and create a special privilege. The Executive Memorandum of April 29, 1994, for example, expressly states that it "does not create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." J.A. at 51. Similarly, the two Executive Orders entitled "Consultation and Coordination with Indian Tribal Governments" both state they are "not intended to create any right, benefit or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." Executive Order No. 13,084, 63 Fed. Reg. at



27655 (May 14, 1998); Executive Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000). The Department of Interior Manual referenced by the Petitioner notes that the expectation of confidentiality does not apply unless "otherwise provided by applicable law, regulations, or Administration policy." J.A. at 58. Finally, the Klamath Project Agreement itself contains an unambiguous statement that it does not create any special rights:

> [This Agreement] does not by itself create, change or alter any rights of any of the parties to the Agreement, nor by itself create an independent right subject to judicial review. Nothing in this Agreement is intended to or shall have the effect of constraining or limiting the United States in carrying out its obligations under law, including its trust obligations. All communications under the agreement are in furtherance of federal responsibilities.

J.A. at 64.

In sum, the federal trust responsibility does not demand preferential treatment of communications between Indian tribes and the United States. There is no historic or contemporary basis for such a privilege. Thus, the tribes are not entitled to greater rights or deference than anyone else.

**(C) The creation of a trustee-beneficiary privilege will adversely impact the public and the tribes.**

Congress enacted the Freedom of Information Act with the express purpose of " 'pierc[ing] the veil of administrative secrecy and [ ] open[ing] agency action to

the light of public scrutiny.' " *Department of the Air Force v. Rose*, 425 U.S. 352, 358 (1976) (cite omitted). The limited exceptions from this policy are "exclusive and must be narrowly construed." *Id.* (citations omitted.)

If this Court paints with a broad brush and creates a privilege for all communications between the tribes and the United States, this Court will limit access to important information that should be available to all under the Freedom of Information Act. There are innumerable circumstances in which such a privilege could adversely affect public resources. Tribes regularly report to the United States on environmental conditions and the use of public resources, such as fish and water in which tribes could be considered co-managers. Tribes regularly gather scientific information regarding environmental conditions and mitigation efforts and report this information to the United States in the hopes of influencing the outcome of a variety of issues. Are all these communications to remain privileged, even though similar information from other entities that impact public resources are uncontrovertibly available to the public through FOIA requests? What possible benefit is served by maintaining a cloak of secrecy over these very public issues?

The present situation of Tacoma demonstrates the potential harmful effects of creating a new privilege. Tacoma is confronting a lawsuit filed by the Skokomish Tribe that alleges $5.8 billion in damages allegedly caused by the Cushman Project on the North Fork of the Skokomish River. In order to preserve these claims, the Skokomish Tribe was required to file pre-1966 damage claims under the Indian Claims Limitation Act of 1982. 28 U.S.C. § 2415 (1998). Through FOIA requests and through discovery in



the damages lawsuit, Tacoma has sought documents that demonstrate the Tribe complied with the Indian Claims Limitation Act, the scope of that compliance, and the precise nature of the claims the Tribe may have preserved. Thus far, the Tribe and the Department of Interior and its constituent agencies have resisted disclosing these documents in both the FOIA and discovery process. Should the so-called trustee-beneficiary privilege be allowed to avoid demonstrating compliance with the jurisdictional requirements of a $5.8 billion lawsuit?

Similarly, the Skokomish Tribe and the United States have exchanged information on every aspect of the Tribe's use of the Skokomish River for over a century. Should Tacoma be restricted from reviewing, evaluating and using this information to defend against the Tribe's claims of $5.8 billion in damages?

The very purpose of the Freedom of Information Act is to shed light on issues of public concern so that all, including the tribes, will benefit from that knowledge. To create another impediment, without congressional authority and where no precedence exists, is unwarranted and prejudicial.

## V. CONCLUSION

The Court's decision in this matter will have a broad impact on hundreds of current and future lawsuits and adjudications and issues of public policy involving Indian tribes across the nation. The Petitioner fails to demonstrate any meaningful justification for creating a new

trustee-beneficiary privilege that protects communications between the United States and Indian tribes. Tacoma respectfully requests this Court to reject this claimed privilege in favor of the policy of open government and unrestricted access to information vital to the public's welfare.

Dated this 13th day of December 2000.

Respectfully submitted,

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In the

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UNITED STATES DEPARTMENT OF THE INTERIOR AND
BUREAU OF INDIAN AFFAIRS,
*Petitioners,*
v.
KLAMATH WATER USERS PROTECTIVE ASSOCIATION,
*Respondent.*

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**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

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## BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF RESPONDENT

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In the

# Supreme Court of the United States

No. 99-1871

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS,
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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

**BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF RESPONDENT**

## INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of more than 900 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

*Amici curiae*'s interest in this case is in preserving public access to federal government records, particularly those that document efforts of interested non-agency parties in controversial government decision-making processes. Congress compels government accountability, in part, through the FOI Act, which requires agencies to disclose the records they use in the course of their business unless one of nine narrowly construed exemptions applies. Thus, *amici* submit this brief in support of the Klamath Water Users Protective Association's argument that Exemption 5 of the FOI Act does not extend to documents submitted by interested third parties to a federal government agency.



## STATEMENT OF FACTS

The core issue of this case is whether communications submitted to the Department of the Interior from Klamath Basin Tribes with a direct interest in the outcome of an agency decision can be closed from public inspection under Exemption 5 of the Freedom of Information Act, hereinafter the "FOI Act." The facts relevant to this case are:

In 1993 the Secretary of the Department of the Interior issued an order directing the heads of all agencies to consult with Tribes prior to making decisions that would affect tribal interests and to make these consultations open to public scrutiny. A year later, President Clinton echoed the Secretary's comments for consultation and openness in a memorandum issued to government agencies.

In 1995 the Department of the Interior began the ongoing process of developing a long-term plan for allocation of water from the Klamath River Basin in Oregon to surrounding interests. Several parties, including Native American Tribes, farmers, environmentalists and local cities, have strong interests in the Department of the Interior's decisions. Two of the most vocal interests are the Klamath Basin Tribes and the Klamath Water Users Protective Association, a nonprofit group composed primarily of local irrigation districts and other water users.

The Department of the Interior received documents advocating the positions of the Klamath Basin Tribes, and of other water users, including the Klamath Water Users Protective Association, pertaining to the water allocation in the Klamath River Basin. The Klamath Basin Tribes and the Klamath Water Users Protective Association similarly submitted correspondence to the Department. The Department

signed an agreement with the Klamath Basin Tribes labeling them "consultants," but did not sign a similar agreement with the association.

Both the Tribes and the association submitted FOI Act requests to agencies of the Department of the Interior, including the Bureau of Indian Affairs, in an effort to view other parties' correspondence with the department. The Klamath Basin Tribes were granted access to the correspondence submitted by the Klamath Water Users Protective Association. However, the Department refused to release the Klamath Basin Tribes' correspondence, citing deliberative-process and attorney-work-product privileges under the FOI Act's Exemption 5, which protects certain inter-agency or intra-agency records.

The Klamath Water Users Protective Association brought suit under the FOI Act to obtain the Klamath Basin Tribes' and others' correspondence with the Department in the U.S. District Court for the District of Oregon. The district court accepted the recommendations of a magistrate judge to grant the Department of the Interior summary judgment because the documents were exempt from the FOI Act as inter-agency or intra-agency memoranda.

The Ninth U.S. Circuit Court of Appeals rejected the Department of the Interior's claim that these records were inter-agency or intra-agency records. The appeals panel wrote that the withheld correspondence had been submitted by an interested party outside the agency in an effort to sway the agency's decision on the allocation of water resources, and, therefore, it was not exempt under Exemption 5.



## SUMMARY OF THE ARGUMENT

This brief urges the Court to affirm the Ninth Circuit's opinion based on the statutory intent of the Freedom of Information Act. The FOI Act is clearly a disclosure statute and Congress intended that exceptions to the general rule of disclosure be narrowly tailored. Because these records are not inter-agency or intra-agency records exempt under Exemption 5, or any other exemption to the FOI Act, they should be released to the public.

The public has a strong interest in the Department of the Interior's water allocation decisions, in the influence various outside and competing interests bring to bear on the decision-making process, and in how the government responds to that influence.

Water allocation decisions are important all across the country for economic, environmental, cultural and a myriad of other reasons. Denying the public access to communications from selected interests will bar the public from understanding how the government reaches these decisions, even though this Court has said that a core purpose of the FOI Act is to foster public understanding of the operations and activities of government.

These tribal communications with the Department of the Interior are not inter-agency or intra-agency records. Following the FOI Act's mandate to narrowly construe exemptions, the Ninth Circuit refused to extend Exemption 5 to these records written by a non-agency party to affect the outcome of an agency's decision-making process. The Ninth Circuit's decision should be affirmed. To deny the public access to information submitted by parties involved in a controversial government decision-making process undermines the public's

ability to oversee the workings of its government.

## ARGUMENT

### I. It is necessary for the public to have access to communications of interested parties attempting to influence an agency during a decision-making process.

The public has a strong interest in knowing who is influencing the government in its decision-making process and how the government accepts or rejects that influence. The FOI Act should serve that interest, and enable the public to comprehend that influence.

In gathering the multiple and conflicting views of tribal, environmental, farming, commercial and other entities, the Department of the Interior is preparing to make complicated decisions that will affect many lives and livelihoods. As evident from the *amicus* briefs submitted on the petition for writ of certiorari, there are a multitude of parties that are interested in the outcome of these determinations.

The Klamath Basin Tribes and the Klamath Water Users Protective Association provided the Department of the Interior with communications evidencing their claims of rights to the water and recommendations for the allocation of those rights. Subsequently, both parties made FOI Act requests for each other's communications. The Tribes were granted their request because the records were not considered exempt. Even though the tribal communications were submitted in the same way as the Klamath Water Users Protective Association communications, they were not released.

Water rights are an extremely controversial issue across



the country, especially in the West, where:

> water is power, literally and figuratively . . . people's attachments to water extend far beyond its financial benefits; water symbolizes security, opportunity, and self-determination. In the desert, it is associated with life, power, and status.

Wendy Nelson Espeland, THE STRUGGLE FOR WATER, POLITICS, RATIONALITY, AND THE IDENTITY IN THE AMERICAN SOUTHWEST, 4-5 (1998).

Historically, the war over water has had a significant impact on the shape of the West. The modern city of Los Angeles and the Owens Valley, where it finds most of its water, have been shaped culturally, politically and economically by their struggled with water rights:

> The scarcity of water in Los Angeles created a strong sense of community in that city. This sense of community permitted (or required) a search for water sources that eventually led to a small agricultural valley in the Sierra Nevada's 300 miles away. . . Transporting the water resulted in continued growth, maintenance of capital values and a stronger community in Los Angeles but it ended economic activity, reduced capital values and decimated a community in Owens Valley.

Donald R. Field, James C. Barron & Burl F. Long, WATER AND COMMUNITY DEVELOPMENT, SOCIAL AND ECONOMIC PERSPECTIVES, 29 (1974).

Because water allocation is such an important issue across

the country, it is essential for the public to know the status of water rights adjudications and water allocations. Without comprehensive access to the opinions expressed, the public cannot critique the government's water allocations decisions, and the news media, who depend upon access to government records, cannot adequately inform the public on these matters. Because of this public concern, the news media devote much effort to covering these issues.

For instance, in one week, more than 40 news stories involving water rights appeared in news publications of general interest around the country.[2] Several stories concerned a pending effort by Native American Tribes to unseat a congressional representative in Montana in order to promote more legislation preferential to their water rights. This issue was covered by publications in as far away as Los Angeles. Kim Murphy, *Native Americans get in the Spirit of Political Empowerment; Elections: Tribes Nationwide are Launching Get-out-the-vote Drives, Seeking to Raise Their Voice Over Environmental and Other Issues Affecting Them*, LOS ANGELES TIMES, Nov. 1, 2000 at Part A, Part 1, Page 16.

Stories on water rights also appeared in specialized publications. For example, a legal newspaper covered a Ninth Circuit decision to treat a Native American Tribe as a state under the Clean Water Act and its effect on subsequent case law. *Non-Indian's Suit Challenging Tribe's Authority to Regulate Her Land is Revived*, REAL ESTATE/ENVIRONMENTAL LIABILITY NEWS, vol. 12, no. 3, Oct. 27, 2000; *Montana v. EPA*, 137 F. 3d 1135 (9th Cir. 1998),

[2] Stories were found through a search in the LEXIS/NEXIS *News Group, All* database for the week of October 26 to November 1, 2000 for "water rights."



*cert denied*, 525 U.S. 921 (1998).

There were no less than 200 stories over the last two years about Native American Tribes' claim of right to water access during a Department of the Interior determination of how to allocate water.[3] *The Denver Post* profiled the Department of the Interior's allocation of the Animas-La Plata water project to Denver and Colorado when the Ute Native American Tribe had a claim of right to some of the water. Bill McAllister, *Senators Debate Animas-La Plata But Vote on Water Project Delayed for Weekend Campaigning*, THE DENVER POST, Oct. 20, 2000 at B-6.

Additionally, the *Albuquerque Journal* profiled the Rio Grande Conservancy District's attempt to garner increased access to water previously diverted to Native American reservation land under an agreement with the Department of the Interior. Bill Hume, *District Seeks To Use Tribal Sovereignty To Block ESA*, ALBUQUERQUE JOURNAL, May 21, 2000 at B2.

The Klamath River Basin water controversies have also been covered extensively by the press. A search of the last two years of media coverage of the Department of the Interior's ongoing struggles over the allocation of water from the Klamath River Basin returned over 20 news stories on the issue.[4]

[3] Stories were found through a search in the LEXIS/NEXIS *News Group, All* database for the "'department of the interior' and indian w/5 'water right'."

[4] Stories were found through a search in the LEXIS/NEXIS *News Group, All* database for "klamath and water w/50 'department of

(continued...)

The news media cover these issues because they are of great public concern. The media cannot serve the public's interest in understanding these issues when pertinent views influencing government decisions are withheld.

## II. One significant purpose behind enacting the Freedom of Information Act was to promote governmental accountability.

It is clear from the Senate report accompanying the enactment of the FOI Act that the purpose of the bill was "to establish a general philosophy of full agency disclosure." S. REP. NO. 813, 89th Cong. 1st Sess. 3 (1965); *see also County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1980).

While signing the FOI Act, President Johnson said the bill was designed to promote governmental accountability:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy

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[4](...continued)
interior'" over the last two years. *See, e.g.*, Richard Carelli, *Supreme Court to hear FOIA case in water-use dispute*, THE ASSOCIATED PRESS STATE AND LOCAL WIRE, Sept. 26, 2000 at State and Regional, Washington Dateline; Julie Tamaki, *California and the West; farmers, tribes have stake in river ruling' environment: Babbitt is expected to decide soon on plan to double trinity's flow and aid fish. Opponents say the water is needed for irrigation and power generation*, LOS ANGELES TIMES, Aug. 9, 2000 at Part A; Part 1; Page 3; Metro Desk.



> around decisions which can be revealed without injury to the public interest.

Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, Weekly Comp. Pres. Doc. 895 (July 4, 1966).

This Court has recognized that the FOI Act's role in enabling citizens to act as watchdogs has not been lost in the cases before it. This Court wrote that the FOI Act "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). Also, this Court acknowledged the FOI Act's role in promoting an informed citizenry — a virtue vital to a functioning democracy and to preventing government corruption. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). This view is consistent with this Court's interpretation of the "purpose" of the FOI Act in a case where records were denied. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

The U.S. Department of Justice has also acknowledged the disclosure purpose of the FOI Act. In 1993 Attorney General Janet Reno rescinded the Department of Justice's 1981 guidelines for defending FOI Act denials, setting the new policy for FOI Act litigation. She wrote that the Department of Justice would "apply a presumption of disclosure" when deciding whether to defend FOI Act denials. Janet Reno, *Memorandum for Heads of Departments and Agencies*, Joint Appendix 138, 138 (Oct. 4. 1993). This presumption, she wrote, is to fulfill the "primary objective" of "maximum responsible disclosure of government information." *Id.*

## III. Exemptions to the Freedom of Information Act are to be narrowly tailored so as not to overburden the primary purpose of the Freedom of Information Act — public disclosure. A narrow reading of Exemption 5 would certainly not allow it to reach the comments of an outside party seeking to further its own interests.

Certainly there are tensions that could arise from the disclosure of government information, and Congress accounted for those that would merit withholding in the nine exemptions codified in the FOI Act. As the legislative history indicates, Congress expected these exemptions to be interpreted with an eye on the fullest disclosure possible. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965); H.R. REP. NO. 1497, 89th Cong. 2d Sess. (1966). Because the primary purpose of the FOI Act is disclosure, any exemptions must be narrowly construed. *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Even though there may be a broadly written exception, it should be construed as narrowly as possible to effect the public disclosure objective of the FOI Act. *Young v. Rice*, 826 S.W. 2d 252, 254, 308 Ark. 593, 596 (Ark. 1992).

The plain text of Exemption 5 allows withholding of documents that would be protected from disclosure when the government is in civil litigation with another party. Therefore, the ultimate question courts must answer in determining whether a document is protected under Exemption 5 is if the document would normally be released under a showing of relevance to the court in a civil case. *United States Dep't of Justice v. Julian*, 486 U.S. 1, 11-12 (1988); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1994).



The U.S. Court of Appeals for the D.C. Circuit has gone the farthest in extending the reach of Exemption 5 by allowing records created by outside objective consultants to be considered inter-agency or intra-agency records. *Formaldehyde Inst. v. HHS*, 889 F.2d 1118 (D.C. Cir. 1989); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). However, the D.C. Circuit has only extended Exemption 5 to parties that have no interest in the outcome of the decision. *Formaldehyde*, at 1123-24; *Soucie*, at 1078. The documents the D.C. Circuit has extended Exemption 5 to cover are created by objective decision-makers who aid the agency in objectively determining its course of actions. The D.C. Circuit's rationale has been that without protection from disclosure, objective parties, who are aiding the agency out of some sense of civic duty, may not want to become embroiled in controversial agency policy making. *Soucie*, at 1078. This rationale does not extend to interested parties who would submit communications to affect agency decisions with or without protection from public disclosure, such as the Klamath Basin Tribes in this case.

Other federal circuits have not defined Exemption 5 as broadly as the D.C. Circuit. Instead these circuits have taken a more narrowly tailored view of the exemption. In *Van Bourg v. NLRB*, 751 F.2d 982, 986 (9th Cir. 1985), the Ninth Circuit held that Exemption 5 would not cover affidavits made by persons outside the agency because they were not created inside the agency or by anyone who had a formal relationship with the agency.

The U.S. Court of Appeals for the Seventh Circuit shared the narrow view of Exemption 5 when it rejected the NLRB's argument that possession of documents made by outside persons made them inter-agency documents. *Thurner Heat Treating Corp. v. NLRB*, 839 F.2d. 1256, 1259-1260 (7th

Circ. 1988). Like the Ninth Circuit's ruling in *Van Bourg*, the Seventh Circuit found that statements of persons not employed by an agency were not inter-agency or intra-agency records.

The U.S. Court of Appeals for the Second Circuit took an even narrower approach to Exemption 5 in *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999), by refusing to extend Exemption 5 to a letter written by a New York city councilman to the Department of Housing and Urban Development. Although the state agency was a partner with the federal agency in task forces and investigations — arguably a formal relationship with the federal agency — the Second Circuit found that Exemption 5 did not extend to a letter sent to the federal government by a member of state government. *Id.*

## IV. Documents submitted by a non-governmental party for the purpose of promoting its self-interest in the outcome of an agency determination are not inter-agency or intra-agency documents.

The Klamath Basin Tribe's letters to the Department of the Interior are not protected communications under Exemption 5, no matter what circuit's test for inter-agency or intra-agency documents is accepted. Allowing them to be so would offend the purpose of the FOI Act by closing public access to ex-parte communications from parties with an interest in the outcome of controversial agency determinations.

The Klamath Basin Tribes are interested parties in an agency determination of public importance. Not only are these communications clearly outside the bounds of the FOI Act's exemptions, but to allow them to be classified as closed under



Exemption 5 would destroy the FOI Act's applicability to agency records and the public's and press' governmental watchdog ability.

At the outset of the Department of the Interior's process in making the determination of the fate of the Klamath River Basin, it had the Klamath Basin Tribes sign consultation agreements. These were in-line with a directive from President Bill Clinton to "consult . . . with" Native American Tribes when making agency decisions that affect tribal interests. William J. Clinton, *Memorandum for the Heads of Executive Departments and Agencies*, Joint Appendix 49, 50 (April 29, 1994). However, the Ninth Circuit rejected the Department of the Interior's attempt to make the Klamath Basin Tribe's "consultants" for Exemption 5 purposes because even under the D.C. Circuit's analysis, records of communications to an agency from interested parties are simply not inter-agency or intra-agency records.

The Ninth Circuit's decision in this case was well founded. The "consultant" status of the Klamath Basin Tribes set forth in their agreement with the Department of the Interior is far differnt from the "consultant" relationship to which the D.C. Circuit has extended Exemption 5. *Soucie*, at 1078. The D.C. Circuit only extended the inter-agency and intra-agency tests to reach communications from consultants who are objective evaluators of agency policy, not interested parties. To allow government agencies to contract in this way would, in effect, allow an agency to close most, if not all, of its records by simply signing agreements with outside persons.

Despite the Department of the Interior's relationship with the Klamath Basin Tribes, these communications are created by outside interested parties. These documents, by their very nature of being created by outside interested parties, cannot

possibly disclose the policy-making process of the Department of the Interior. Therefore, they fail to meet the basic test for the deliberative process privilege.

## V. Consultations with Native American Tribes about government decisions that affect tribal interests are to be open to the public so that the press and other interested groups can evaluate controversial tribal influence on government decisions.

The Klamath Basin Tribes may have a unique, trust-like relationship with the Department of the Interior. However, this relationship does not afford the Tribes greater rights in agency determinations than other parties involved in the determination. *Skokomish Indian Tribe v. F.E.R.C.*, 121 F.3d 1303, 1308-09 (9th Cir. 1997); *Covelo Indian Community v. F.E.R.C.*, 895 F.2d 581, 586 (9th Cir. 1990). In cases decided by the Ninth Circuit, the United States trust relationship with Native Americans has not been found to grant Tribes greater rights than a party would normally receive under the Federal Energy Regulatory Commission's regulations. *Skokomish Indian Tribe*, at 1308-1309; *Covelo Indian Community*, at 586.

Because the Klamath Water Users Protective Association's communications with the Department of the Interior were open for public inspection, the Tribes' communications should likewise be open for public inspection. "To hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the Department." *Klamath Water Users Protective Ass'n v. Department of the Interior*, 189 F.3d 1034, 1039 (9th Cir. 1999), *cert. granted*, 121 S.Ct. 28



(2000).

Finally, and perhaps most importantly, the Department of the Interior's consultations with the Tribes have been declared public by the President and the agency itself. The Secretary of the Department of the Interior issued a directive in 1993 that the heads of all agencies should consult with Tribes prior to making a decision that could affect tribal interests. Secretary of the Interior Bruce Babbit Order No. 3175, Joint Appendix 52, 53 (Nov. 8 1993). The directive explicitly stated that these consultations "are to be open and candid so that all interested parties may evaluate for themselves the potential impact of the proposals." *Id.* President Clinton issued a memorandum containing an identical directive in 1994. William J. Clinton, *Memorandum for the Heads of Executive Departments and Agencies*, Joint Appendix 49, 50 (April 29, 1994); *Klamath Water Users Protective Ass'n*, at 1039.

## CONCLUSION

The Federal Freedom of Information Act was created by Congress in part to aid the public and the press in observing the processes of government. For this reason Congress insisted that exceptions to the FOI Act should be interpreted narrowly.

As organizations dedicated to furthering public access and to helping reporters keep the public informed of the government's actions, *amici*'s interest is to protect reporter access to governmental records. Although the Department of Justice may wish to make this case seem like an isolated issue of access to tribal communications, what it asks this court to rule will have a more far-reaching effect on access to government documents. A ruling in line with the Department of Justice's

argument could close access to documents submitted to a federal agency so long as the agency labels the submitting party a "consultant." This potential for agencies to circumvent the objectives of the FOI Act would not only prevent water users from viewing the arguments of competing interests, it would allow parties who stand to reap financial benefits to press their interests with the government completely cloaked from public scrutiny.

We believe that the Department of Justice's position would not only interfere with the right of the press and the public to inspect public documents, but that it offends the FOI Act's mandate of disclosure. For this reason, we ask the Court to reject the Department of Justice's arguments and affirm the decision of the Ninth Circuit.

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